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In the Supreme Court of the United States

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, waives the federal government's sovereign immunity for certain tort actions but sets forth 13 enumerated exceptions, including exceptions for all claims arising out of the exercise of a discretionary function, all claims "arising in a foreign country," and all claims "arising out of the combatant activities of the military * * * during time of war." *Id.* § 2680(a), (j), (k). In *Feres* v. *United States*, 340 U.S. 135, 138 (1950), this Court recognized a non-enumerated exception for all claims based on injuries to members of the United States armed forces that "arise out of or are in the course of activity incident to service."

The questions presented in this case are:

1. Whether the Third Circuit, in conflict with decisions of the Second, Fifth, Sixth, Ninth, and Eleventh Circuits, correctly ruled that the *Feres* doctrine bars suit by a soldier's widow and children for injuries that arose out of an ordinary automobile accident occurring on a public road running through an Army post, where the decedent's supposed "activity incident to service" at the time of the fatal accident was driving home in his personal vehicle after completing his military job.

2. Whether, in view of the widespread condemnation of *Feres*, including by several current Members of this Court (see *United States* v. *Johnson*, 481 U.S. 681, 692-703 (1987) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *Lombard* v. *United States*, 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring and dissenting in part), cert. denied, 462 U.S. 1118 (1983)), and given what four judges of the Third Circuit in this case called "the compelling argument for the abandonment of *Feres*," this Court should, as the Third Circuit judges urged, "grant certiorari to revisit" *Feres* and overrule it.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 176 F.3d 652. The opinion of Judge Rendell, joined by Chief Judge Becker and Judges Nygaard and McKee, dissenting from the denial of rehearing *en banc* (App., *infra*, 11a-12a) is reported at 180 F.3d 564. The opinion of the district court (App., *infra*, 13a-23a) is reported at 1 F. Supp. 2d 498.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1999, and rehearing was denied on June 30, 1999 (App., *infra*, 10a, 11a). On September 17, 1999, Justice Souter extended the time in which to file the petition for a writ of certiorari to and including October 28, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act are set forth at App., *infra*, 24a-27a.

STATEMENT

Private Charles A. Richards, Jr. was killed by an Army truck while driving home from work at Fort Knox to care for his pregnant wife. His widow brought a wrongful death action, alleging both that the truck had been negligently maintained, and that the driver of the truck had been negligent in driving it. Recognizing a division in the circuits on whether claims of this sort could proceed under *Feres* v. *United States*, 340 U.S. 135 (1950), a panel of the Third Circuit held that *Feres* barred the suit. At the same time, however, the Third Circuit "express[ed] misgivings about" its decision and acknowledged that the result was "counter-intuitive and inequitable" as well as illustrative of "the disconnect that has come to exist between the philosophy behind *Feres* and its application." App., *infra*, 8a, 10a.

Four judges of the Third Circuit dissented from the denial of rehearing *en banc*. Calling *Feres* a "travesty," they "urge[d] the Supreme Court to grant certiorari" and overrule it. *Id.* at 12a.

A. The Federal Tort Claims Act And The Judicial Creation Of The *Feres* Doctrine.

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, which waives federal sovereign immunity for certain tort actions and vests the federal district courts with exclusive jurisdiction over such actions. Specifically, the FTCA permits the imposition of liability

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b). An "employee of the Government" is defined as including "members of the military or naval forces of the United States." *Id.* § 2671. The FTCA also specifies that the phrase "acting within the scope of his office or employment" in Section 1346(b) "means acting in [the] line of duty" in "the case of a member of the military or naval forces of the United States." 28 U.S.C. § 2671.

The broad waiver of immunity contained in the FTCA, however, is subject to no fewer than 13 enumerated exceptions. See 28 U.S.C. § 2680. For example, Congress expressly exempted "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). It also broadly exempted "[a]ny claim arising in a foreign country." *Id.* § 2680(k). Except for certain intentional tort claims brought against federal investigative or law enforcement officers,

Congress exempted intentional torts, including all claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 2680(h). And Congress exempted all claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of * * * an employee of the Government." *Id.* § 2680(a).

2. Shortly after the FTCA was enacted, this Court decided *Brooks* v. *United States*, 337 U.S. 49 (1949). In *Brooks*, two soldiers and their father were driving on a public highway when they were hit by an Army truck. The government moved to dismiss for lack of jurisdiction, arguing that because the brothers were in the Army, claims arising from their injuries and death were excepted from the FTCA. The Court rejected the argument. "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.'" *Id.* at 51 (emphasis in original). The accident, explained the Court, "had nothing to do with the [brothers'] Army careers * * * except in the sense that all human events depend on what has already transpired." *Id.* at 52.

A year after *Brooks*, the Court decided *Feres* v. *United States*, 340 U.S. 135 (1950). Two of the three consolidated cases involved claims of medical malpractice; the third was a wrongful death claim arising out of a soldier's death in a barracks fire. Deciding that none of the claims should have been permitted to go forward, the *Feres* Court held that in addition to the exceptions specified by Congress in the FTCA, Congress intended to exempt all tort claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. In *United States* v. *Johnson*, 481 U.S. 681 (1987), four

dissenting Justices criticized *Feres* as "wrongly decided and heartily deserv[ing of] the widespread, almost universal criticism it has received." *Id.* at 701 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ.) (internal quotation marks omitted).

B. The Proceedings Below.

1. On June 26, 1995, Private Charles A. Richards, Jr. was killed by a five-ton Army truck. He was 21 years old. The accident took place on Kentucky Highway 1638, a public road crossing Fort Knox, in Muldraugh, Kentucky, near an intersection with another public road. According to the official accident report of the Kentucky State Police, the Army truck ran a red light and broadsided Mr. Richards's car, shoving it into a ditch, and finally coming to rest on top of the car, crushing Mr. Richards to death. C.A. Joint App. 187. At the time he was killed, Mr. Richards was off duty for the day and was driving home in his personal car to care for his wife, Shammara, who was three months pregnant with their second child.

2. On March 26, 1997, Mrs. Richards initiated this wrongful death suit in the United States District Court of the Virgin Islands. Invoking the FTCA as the basis for jurisdiction and naming the United States as defendant, Mrs. Richards advanced claims for herself as well as on behalf of her husband's estate and her two minor children, Shanee and Charles. App., *infra*, 28a-32a. As bases for liability, Mrs. Richards alleged that the Army had been negligent in failing to properly maintain the truck involved in the accident, in allowing the truck to be operated in an unsafe condition (including being equipped with defective front brakes, damaged tail and rear turn lamps, contaminated brake fluid, and an inoperable horn), and in allowing the driver of the truck to drive it even though he was not licensed to operate a vehicle of that class. *Id.* at 30a-31a. Mrs. Richards also alleged that the government was liable under a theory of

respondeat superior for the driver's negligence in running a red light and losing control. *Id.* at 31a.

The government answered, admitting that the truck's driver "was acting within the course and scope of his federal employment at the time of the accident." App., *infra*, at 35a. The government denied, among other things, that Mr. Richards was on personal business at the time of the accident. *Ibid.* The government also asserted various defenses, including that the court lacked subject matter jurisdiction and that Mrs. Richards's claims were "barred by the *Feres* Doctrine." *Ibid.* Relying on *Feres*, the government then moved to dismiss the complaint for lack of subject matter jurisdiction.

3. Accepting the allegations in the complaint as true (including the allegation that Mr. Richards was off duty and headed home when he was killed), the U.S. District Court of the Virgin Islands granted the government's motion to dismiss. App., *infra*, 13a-23a. The court described its approach as follows. First, in deciding whether the injuries in this case "arise out of or are in the course of activity incident to [military] service," the court had to consider "the totality of the circumstances," including "(1) the service member's duty status; (2) the situs of the injury; (3) and the activity the service member was performing." *Id.* at 16a. "When the totality of the circumstances show that the *Feres* doctrine bars suit," the court reasoned, it "may dismiss the suit without considering the underlying *Feres* doctrine rationales." *Id.* at 16a-17a. "On the other extreme," however, "even when the three-factor totality of the circumstances test strongly indicates that the *Feres* doctrine does not bar suit, the Court must look to the *Feres* doctrine rationales before permitting suit." *Id.* at 17a. The court described those rationales: avoiding judicial involvement in military affairs; preserving the "federal nature" of the relationship between service members and the government; and preventing excess tort recovery by those eligible for benefits such as

the "death gratuity" and certain other benefits provided to Mrs. Richards. *Id.* at 16a.

The court first considered Mrs. Richards's argument that all three of the "factors generally considered in the totality of the circumstances conclusively show that [Mr.] Richards' death did not occur incident to service," because "[Mr.] Richards was in off-duty status, on a public road, and performing an act not related to his military duties — going home." App., *infra*, 17a. The district court observed that the Ninth Circuit, in a "factually similar case," "held that suit by an off-duty service member injured while possibly returning to the base after enjoying a short period of liberty, on a public road passing across an easement on military property, may not be barred by the *Feres* doctrine." *Id.* at 17a (citing *Troglia* v. *United States*, 602 F.2d 1334 (9th Cir. 1979)). In contrast, the court wrote, the Eleventh Circuit had held that *Feres* barred suit when an off-duty service member who was driving home from the grocery store was injured on a public road running through an easement on military property. *Id.* at 17a-18a (citing *Flowers* v. *United States*, 764 F.2d 759 (11th Cir. 1985)). Although the district court suggested that consideration of "the three-factor test points more strongly toward finding a *Feres* bar than toward permitting suit," it ultimately ruled that application of that test was "inconclusive." *Id.* at 19a. It did so because "the two circuits that have considered factually similar cases are split and because the Third Circuit has not had occasion to review a factually similar case." *Ibid.*; see also *id.* at 23a (again noting existence of "split" in the circuits).

Turning finally to *Feres*'s rationales, the district court concluded that they "support a finding that the Plaintiffs' suit is barred by the *Feres* doctrine." App., *infra*, at 19a-22a. On that basis, it dismissed the lawsuit.

4. The Third Circuit affirmed. App., *infra*, 1a-10a. At the outset, it noted that "[t]he Supreme Court has not articulated a specific method for determining whether an

injury is 'incident' to military service," but has instead "instructed courts to examine each case in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.* at 4a (internal quotation marks omitted). Echoing the district court's initial analysis, the Third Circuit explained that, "[t]o assist in that inquiry," the lower courts "consider a number of factors including: (1) the service member's duty status; (2) the site of the accident; and (3) the nature of the service member's activity at the time of the injury." *Ibid.*

Like the district court, the Third Circuit took note of the fact that "the two United States Courts of Appeals that have considered" the applicability of *Feres* to "similar facts differ on whether *Feres* bars suit." App., *infra*, at 5a (citing the Eleventh Circuit's decision in *Flowers* and the Ninth Circuit's decision in *Troglia*). Nevertheless, it concluded that this case was more analogous to *Flowers*, where *Feres* had been applied to bar suit. The panel emphasized that the accident that took Mr. Richards's life had occurred on a public highway, but one that ran through a military installation. *Id.* at 6a-7a. In addition, wrote the panel, "Private Richards's activity at the time of the accident supports the application of *Feres*." *Id.* at 7a. The panel thought it significant that, at the time of the accident, Mr. Richards was "driving home from his duty station" across military property and not "simply driving on a public road as a member of the public." *Ibid.* The panel hinted that these facts might have been, but were not necessarily, dispositive: "Had Private Richards been struck by a military vehicle while traveling home from a place unrelated to his military service, or on a public road outside the Army base, we may have reached a different conclusion." *Ibid.* On the basis of this analysis, the panel concluded that *Feres* barred suit under the "totality of the circumstances." *Id.* at 8a.

Unlike the district court, which in a two-step process had examined the result in light of *Feres*'s rationales, the Third Circuit held that only one step was proper. Once a court

determines that activity was incident to service, on the basis of "the totality of the circumstances in light of the evaluation of the factors," inquiry into *Feres*'s purposes is unnecessary. At the same time, however, the Third Circuit went on to examine *Feres*'s purposes in order to explain why the result in this case — which it called "counter-intuitive and inequitable" — "illustrates the disconnect that has come to exist between the philosophy behind *Feres* and its application." App., *infra*, 8a, 10a.

Quoting *United States* v. *Shearer*, 473 U.S. 52, 57 (1985), the panel observed that *Feres*

> seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

App., *infra*, 8a. An action in which "a soldier attempted to sue the commander of his platoon for injuries received during battle" would obviously threaten the "special relationship between soldier and superior," and would be barred under *Feres*. *Id.* at 9a. To the panel, however, this case was vastly different. Mr. Richards had been killed on a public highway, maintained and patrolled by the Commonwealth of Kentucky, and used by anyone who chose to drive on it. "[U]nlike the hypothetical * * * involving a soldier engaged in combat, the accident that took Private Richards's life was not necessarily related to his military duty." *Ibid.* Rather,

> it was purely a matter of chance that Private Richards's automobile, rather than a civilian's vehicle, was struck by the military fuel truck, and that Private Richards, rather than a civilian, was killed.

Ibid. The widow of a civilian would obviously be free to sue the Army without fear of *Feres*; that lawsuit, in turn, would

be "no less or more intrusive" than Mrs. Richards's. The court wrote:

> [W]hile it is true that but for Private Richards' active status in the military, he would not have been "in the same place at the same time with the same purpose" at the time of the accident, it is not at all clear that Mrs. Richards's suit implicates the "special relationship" between her deceased husband and his superiors in the manner contemplated [by the Supreme Court].

Id. at 9a-10a. "Thus," the panel concluded, "we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status." *Id.* at 10a.

5. Four judges of the Third Circuit dissented from the denial of rehearing *en banc*. App., *infra*, 11a-12a (Rendell, J., joined by Becker, C.J., and Nygaard and McKee, JJ., dissenting). "This case," they wrote, "presents yet another compelling argument for the abandonment of the *Feres* doctrine." *Id.* at 11a. The four judges criticized *Feres* because it "represents * * * a 'bad estimation[]' of what Congress intended to do (but did not do), in the Federal Tort Claims Act." *Id.* at 11a-12a (quoting Justice Scalia's dissent in *United States* v. *Johnson*, 481 U.S. 681, 695 (1987)). No less disturbing, they wrote, *Feres* is "being employed by many courts on a regular basis to deny a military employee's recovery and to prevent the government's accountability for injuries sustained in connection with essentially civilian activities wholly unrelated to military service." *Id.* at 12a. Calling the *Feres* doctrine a "travesty," the judges "urge[d] the Supreme Court to grant certiorari," to "revisit" *Feres*, and to overrule it. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a question over which the courts of appeals are hopelessly divided: how to determine whether injuries are suffered as a result of "activity incident to service" within the meaning of *Feres* v. *United States*, 340

U.S. 135, 138 (1950). The question is of critical importance to members of the American military and their families and dependents, for the answer determines whether or not in a particular case they will be afforded the remedies available to all other Americans under the Federal Tort Claims Act.

As the Third Circuit stressed, Mrs. Richards's lawsuit is nothing like one in which "a soldier attempt[s] to sue the commander of his platoon for injuries received during battle" (App., *infra*, 9a), the paradigmatic example of "activity incident to service." Nor does this case involve a service member's challenge to any peculiarly military judgments, which would also unquestionably be barred under *Feres*. Cf., *e.g.*, *Minns* v. *United States*, 155 F.3d 445 (4th Cir. 1998) (barring claims by children born of Gulf War veterans for severe birth defects caused by pesticides administered in anticipation of defending against biological and chemical warfare), cert. denied, 119 S. Ct. 874 (1999). Nor is Mrs. Richards's action one for military medical malpractice, to which all the circuits apply a rule that (unjust though it might be) at least has the virtue of uniformity: the plaintiff always loses. Cf., *e.g.*, *Cutshall* v. *United States*, 75 F.3d 426 (8th Cir. 1996) (barring claims by a Marine corporal who was misdiagnosed as having an infection and repeatedly assured she did not have cancer when in fact she did).

Mrs. Richards, instead, sued because her husband was killed on his way home by a negligent truck driver driving a negligently maintained truck, the type of routine though tragic accident that happens every day, all over the country, to people who have no connection to the American military. In deciding whether suits such as this should be permitted to go forward, the courts of appeals use varying approaches, and, as the Third Circuit panel noted here (App., *infra*, 5a), cases such as this have yielded sharply conflicting results. The result has been what Judge Guido Calabresi has called, with matchless understatement, "that singular tangle of seemingly inconsistent rulings and rationales known as the

Feres doctrine." *Taber* v. *Maine*, 67 F.3d 1029, 1031 (2d Cir. 1995). The Court should grant the petition in order to resolve this conflict over *Feres*'s scope.

Conflict among the circuits aside, this case also presents the question raised by the four dissenting judges of the Third Circuit in urging the Court to grant certiorari: whether it is time for the Court to "revisit what [it has] wrought." App., *infra*, 12a. The *Feres* doctrine — an indeterminate and unpredictable creature of federal common law — is not just unfair and unworkable, it is illegitimate. The Court should grant the petition and finally consign *Feres* to the jurisprudential graveyard, where it belongs.

I. THE THIRD CIRCUIT'S TEST FOR DETERMINING WHAT CONSTITUTES "ACTIVITY INCIDENT TO SERVICE" AND ITS HOLDING THAT *FERES* BARS PETITIONER'S CLAIMS CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The different circuits' approaches to *Feres* in cases such as this one are in conflict, and the different approaches have yielded irreconcilable results. Unlike the uniform, "plaintiff always loses" rule applied in actions for military medical practice, what constitutes injury arising out of other "activity incident to service" varies from jurisdiction to jurisdiction — resulting in precisely the chaotic welter of "laws which fluctuate in existence and value" that *Feres* itself decried. 340 U.S. at 143. For members of the U.S. armed forces and their families and dependents, the decisions of the courts of appeals interpreting *Feres* have created a macabre and perverse legal regime: their right to recovery under the FTCA depends on the jurisdiction in which they are lucky enough to live, or to die.

A. The Circuits Have Adopted Vastly Different Approaches To Applying The *Feres* Doctrine.

Whether *Feres* bars a tort action based on injury to a member of the armed forces hinges on whether the service

member was, when injured, engaged in "activity incident to service." In determining what constitutes "activity incident to service" within the meaning of *Feres,* the courts of appeals are using at least five different approaches.

1. The Third Circuit, along with the Seventh, Eleventh, and D.C. Circuits, considers various "factors" "in light of the totality of the circumstances," among them "(1) the service member's duty status; (2) the site of the accident; and (3) the nature of the service member's activity at the time of the injury." App., *infra*, 4a; accord *Stephenson* v. *Stone*, 21 F.3d 159, 164 (7th Cir. 1994); *Whitley* v. *United States*, 170 F.3d 1061, 1070-75 (11th Cir. 1999); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) (per curiam). Once these courts determine that the plaintiff in a case suffered injuries from an "activity incident to service," judicial inquiry ends: *Feres* bars the suit regardless of "whether or not the circumstances of a case implicate the rationales for the *Feres* doctrine." *Verma*, 19 F.3d at 647; accord *Selbe* v. *United States*, 130 F.3d 1265, 1268 (7th Cir. 1997); *Whitley*, 170 F.3d at 1075. As the Third Circuit held here, even if allowing the suit would in no way undermine, or even implicate, the rationales underlying *Feres*, application of this multi-factor test is conclusive — even when this analysis produces results that are "counterintuitive" and "inequitable." App., *infra*, 8a-10a.

2. The First, Fourth, Fifth, Sixth, and Tenth Circuits also decide whether activity is incident to service by assessing "the totality of the circumstances" as evidenced by "certain factors" and "prongs," but they consider these factors in light of the *Feres* rationales. *Miller* v. *United States*, 42 F.3d 297, 301-02 (5th Cir. 1995); accord *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-83 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-05 (4th Cir. 1996); *Fleming* v. *U.S. Postal Service*, 186 F.3d 697, 699 (6th Cir. 1999); *Shaw* v. *United States*, 854 F.2d 360, 362 (10th Cir. 1988). All of these courts understand

Feres as grounded in the three rationales articulated in *Johnson* v. *United States*, 481 U.S. 681, 689-91 (1987): the federal nature of the relationship between service members and the government; the availability of certain disability and death benefits; and the risk that tort suits might entangle the judiciary in military affairs. Although the First, Fourth, and Tenth Circuits give all three rationales equal weight, the Fifth and Sixth do not. The Fifth Circuit concerns itself with the relationship between the service member and the armed services and thus "often treat[s] the serviceman's duty status as the most important factor," *Schoemer* v. *United States*, 59 F.3d 26, 28 (5th Cir.), cert. denied, 516 U.S. 989 (1995); the Sixth Circuit, in contrast, considers mainly whether allowing an FTCA action would "impermissibly insinuate the civilian judiciary into military decisions," *Fleming*, 186 F.3d at 700 (internal quotation marks omitted).

3. The Second Circuit takes an entirely different approach, based on its reasoning that *Brooks* and *Feres* are best understood as part of a military analogue to workers' compensation. See *Taber* v. *Maine*, 67 F.3d 1029, 1037-45 (2d Cir. 1995) (Calabresi, J.); see also *Bradshaw* v. *United States*, 443 F.2d 759, 762 (D.C. Cir. 1971) ("[T]he *Brooks/Feres* distinction falls into the work related non-work related dichotomy characteristic of workmen's compensation schemes generally."). Thus, in determining whether activity is "incident to service," the Second Circuit applies the familiar rule of workers' compensation law: injury results from activity incident to service only if the victim was acting within the scope of his military employment at the time he was injured; activity is not incident to service when the victim was acting outside the scope of employment. Given the military setting, this rule is subject to an exception "in the extreme case": recovery may be barred only if a lawsuit might implicate considerations relating to the discipline of the tortfeasor, as in *United States* v. *Shearer*, 473 U.S. 52 (1985) (claim that the Army had negligently failed to maintain disciplinary control over a soldier who abducted and

murdered another soldier). See *Taber*, 67 F.3d at 1052; cf. *Wake* v. *United States*, 89 F.3d 53, 58, 61 (2d Cir. 1996) (holding that scope-of-employment considerations did "not come into play"; recovery barred in part because of such disciplinary considerations). The Sixth Circuit has expressly rejected the approach taken by the Second Circuit in *Taber*. *Skees* v. *United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997).

4. The Eighth Circuit eschews multi-pronged inquiries into factors and looks instead to the three rationales underlying *Feres* that were set out in *Johnson*. See, *e.g.*, *Brown* v. *United States*, 151 F.3d 800, 804-05 (8th Cir. 1998). If allowing recovery would frustrate *Feres*'s purposes, an action is barred.

5. The Ninth Circuit has "reluctantly recognized * * * that [a] reconciliation of prior pronouncements on the [*Feres*] doctrine is not possible." *Dreier* v. *United States*, 106 F.3d 844, 848 (9th Cir. 1996) (citation and internal quotation marks omitted); see also *Estate of McAllister* v. *United States*, 942 F.2d 1473, 1476 (9th Cir. 1991) ("Precisely how a court should apply the *Feres* doctrine to the facts of a given case * * * remains unclear."), cert. denied, 502 U.S. 1092 (1992). Thus, while that court has sometimes "looked to four factors" when "the existence of a *Feres* bar is not clear" — duty status, site of injury, nature of the activity, and the availability of military benefits in a particular case — the Ninth Circuit in effect applies no test at all. *Dreier*, 106 F.3d at 848. Instead, the Ninth Circuit resorts to "a comparison of fact patterns" as "the most appropriate way to resolve *Feres* doctrine cases." *Ibid.* (internal quotation marks omitted).

B. In Other Circuits, *Feres* Would Not Have Barred Petitioner's Claims.

Under the approach to *Feres* used in other circuits, this case would have come out the other way.

1. In the Second Circuit, Mrs. Richards's suit would have gone forward. Like Mrs. Richards, the plaintiff in *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995), sued the government for injuries arising out of a vehicular accident, alleging (as does Mrs. Richards) that the government was liable under a theory of *respondeat superior*. See *id.* at 1052. The court held that *Feres* did not bar the claim: the plaintiff had not been acting in the scope of his employment when he was hit, and "negligence alleged in the operation of a vehicle" does not implicate the types of issues involving tortfeasor military discipline that might require a bar in the "extreme case." *Ibid.*

The same is true here. Driving home from work in one's own car after being released from duty is not within the scope of a person's employment. See generally 8 AM. JUR. 2D, *Automobiles and Highway Traffic* § 771 (1997); *Annotation*, Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile, 27 A.L.R. 5th 174, § 3 (1995). As in *Taber*, moreover, the fact that the driver of the Army truck that killed Mr. Richards may have been negligent does not touch on matters of military discipline. Indeed, Shammara Richards is alleging that the government is liable because its truck driver negligently ran a red light — a distinctly non-military act, and one that has no bearing on the chain of command or other military relationships. Under Second Circuit law, therefore, Mr. Richards plainly was not injured in the course of any "activity incident to service," and thus *Feres* would not have barred Mrs. Richards's suit.

2. Mrs. Richards would also have been allowed to prosecute her case in those circuits that consider whether or not a lawsuit would undermine *Feres*'s purposes. As the Third Circuit itself acknowledged, Mrs. Richards's action did not implicate "the special relationship between her deceased husband and his superiors," and thus would not frustrate the rationales underlying the *Feres* doctrine. App., *infra*, 9a.

Had the Third Circuit applied the test of the courts that evaluate various factors in light of *Feres*'s underlying reasons, Mrs. Richards likely would have won, given that in those jurisdictions the factors are not by themselves dispositive. And had the Third Circuit applied the Eighth Circuit's approach, which looks only to the *Feres* rationales, there can be no doubt of the result. Again, the Third Circuit itself stated that the purposes underlying *Feres* did not support the use of the doctrine in this case. Because Mrs. Richards's suit would not undermine the purposes of *Feres*, *Feres* would not pose a bar.

3. Under the Ninth Circuit's "most similar case" analysis, Mrs. Richards's suit would have gone forward as well. Both the Third Circuit and the district court readily acknowledged that this case closely resembles *Troglia* v. *United States*, 602 F.2d 1334 (9th Cir. 1979). App., *infra*, 5a (noting that *Troglia* involved "similar facts"); *id.* at 17a (calling *Troglia* "factually similar"). *Troglia* involved a claim by a service member hit by a car on a federally owned highway just outside an air base. The Ninth Circuit held that if it was determined on remand that the service member was traveling on personal business, *Feres* would not bar his suit.

Nor is *Troglia* an isolated case in the Ninth Circuit. That court has rejected *Feres* bars in many other cases involving very similar facts. See, *e.g.*, *Dreier* v. *United States*, 106 F.3d 844 (9th Cir. 1996) (action arising out of the death of an off-duty sailor who drowned in a drainage channel located on base); *Green* v. *Hall*, 8 F.3d 695 (9th Cir. 1993) (claim by an off-duty soldier who was hit by a car after leaving post to go out for breakfast), cert. denied, 513 U.S. 809 (1994); *Mills* v. *Tucker*, 499 F.2d 866 (9th Cir. 1974) (action arising out of the death of a sailor returning from leave to his on-base home and killed in a car accident inside the installation); see also *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991) (claim by an officer who was harassed at work on base by her military subordi-

nates). There can be little question, then, that in the Ninth Circuit, Mrs. Richards would have been allowed to proceed with her claims, since the "most similar cases" in that jurisdiction would have required this result.

C. The Circuits Have Reached Conflicting Results In Cases Factually Similar To This One.

Given the overall indeterminacy of the multi-factor analyses employed in whole or part outside the Second, Eighth, and Ninth Circuits, it is hardly surprising that virtually identical cases have yielded irreconcilable results in those jurisdictions.

In one case, in fact, the *en banc* Eleventh Circuit divided evenly over the application of its multi-factor test to facts almost exactly like those in *Feres* itself. In *Feres*, this Court held that a soldier's widow could not recover for her husband's death in a barracks fire on an Army post. In *Elliott* v. *United States*, 13 F.3d 1555 (11th Cir. 1994), in contrast, a panel affirmed a multi-million dollar judgment against the government for severe injuries to a service member and his wife who suffered carbon monoxide poisoning at their on-post apartment, holding that *Feres* posed no bar. Although the panel decision was vacated, 28 F.3d 1076 (11th Cir. 1994), the full Eleventh Circuit affirmed the judgment against the government by an equally divided court, 37 F.3d 617 (11th Cir. 1994). (Curiously, the Solicitor General's office apparently chose not to petition for a writ of certiorari in *Elliott*, electing to let a $9 million judgment stand rather than ask this Court to reverse summarily in a case factually indistinguishable from *Feres*.)

Moreover, in many cases involving facts that are virtually indistinguishable from those present here, courts have held, in contrast to the Third Circuit, that *Feres* does *not* bar recovery. See, *e.g.*, *Fleming* v. *U.S. Postal Service*, 186 F.3d 697 (6th Cir. 1999) (claim by an off-duty soldier who was hit by a truck on his way to work); *Pierce* v.

United States, 813 F.2d 349 (11th Cir. 1987) (per curiam) (claim by an off-duty soldier who was hit by a car while running errands); *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980) (claim by the widow of a soldier killed in an accident on post while driving home to take leave). In other cases with virtually indistinguishable facts, however, courts have held that *Feres* does bar recovery. See, *e.g.*, *Stewart* v. *United States*, 90 F.3d 102 (4th Cir. 1998) (claim by an off-duty soldier who was hit by a car while driving home to shower and change after physical training session); *Lauer* v. *United States*, 968 F.2d 1428 (1st Cir.) (claim by an off-duty sailor who was hit by a car while walking on a highway off post), cert. denied, 506 U.S. 1033 (1992); *Shaw* v. *United States*, 854 F.2d 360 (10th Cir. 1988) (claim by an off-duty soldier who was hit by a truck on post while driving to work). That Mrs. Richards would or would not have been barred under these cases is no argument against review — it is, rather, a compelling reason why guidance from this Court is needed. *Feres* itself was predicated on the desirability of uniformity in the law that governs members of the armed forces. See 340 U.S. at 142-43. In the course of trying to apply *Feres*'s rule, however, courts have created a body of law that is, at its core, indeterminate and incoherent.

D. The Decision Below Was Wrong.

As the preceding discussion suggests, the Third Circuit's decision was flawed at every turn. Given that *Feres* is in effect a "judicially crafted rule," *United States* v. *Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring and dissenting), and a "creature of federal common law," *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting), it is a bizarre legal regime that would have courts determine if activity is "incident to service" within the meaning of the *Feres* doctrine without *any* reference to the principles on which that doctrine rests. Moreover, even the multi-factor, totality-of-the-circumstances approaches that do look to *Feres*'s purposes are so indetermi-

nate as to be meaningless, yielding a body of case law that in essence amounts to no more than results in search of rationales.

The Third Circuit's decision was also incorrect on its own terms. The court applied its test mechanically, checking each "factor" off its list regardless of whether the factors were truly relevant. Whether someone is "off duty" as opposed to "on leave" often makes no difference, for example; in either status a service member is subject to recall by his commanders, and in both statuses he is perfectly free to go about his personal business. Whether an accident occurs within the literal confines of a military installation is also irrelevant in many cases, as it was here: Mr. Richards was driving on a public highway, and it was merely happenstance that he was driving on that road within Fort Knox, as opposed to driving on the same road but outside Fort Knox, when he was killed. The nature of the activity at issue (that Mr. Richards was driving home from work, as opposed to driving home from doing errands) was also of marginal relevance here. Driving one's own car to one's home at the end of the work day is no more "military" than any other routine, daily activity engaged in by anyone, military or not.

At bottom, the Third Circuit's holding that Charles Richards — off duty and finished with work, on a public highway, driving his own car home — was nonetheless acting "incident to service" comes down to this: he was *acting incident* to service because he was *in* the service. That, however, is not the law. Mr. Richards's death "had nothing to do with * * * [his] Army career[] * * * except in the sense that all human events depend on what has already transpired." *Brooks* v. *United States*, 337 U.S. 49, 52 (1949). In holding that *Feres* barred the lawsuit that Mrs. Richards brought after her husband's death, the Third Circuit was wrong.

II. IN LIGHT OF THE WIDESPREAD CRITICISM OF THE *FERES* DOCTRINE AND WHAT FOUR THIRD CIRCUIT JUDGES CALLED "COMPELLING ARGUMENT[S]" FOR ITS "ABANDONMENT," THIS COURT SHOULD CONSIDER OVERRULING IT

A. *Feres* Has Been The Subject Of Withering Judicial Criticism.

Dissenting from the denial of rehearing *en banc* in this case, four judges of the Third Circuit took the remarkable step of excoriating the *Feres* doctrine as a "travesty" and "urg[ing]" this Court "to grant certiorari" and "revisit what we have wrought." App., *infra*, 12a. Yet in expressing doubts about the validity or fairness of the *Feres* doctrine, Chief Judge Becker and Judges Nygaard, McKee, and Rendell have merely joined a chorus of other federal judges, including members of this Court.

The judges who have criticized *Feres* over the years have sat on the appellate and trial benches in nearly every jurisdiction:

- From the First Circuit: Circuit Judges Boudin, Lynch, Lipez, and Selya, and District Judges Carter and Acosta. See *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 681-85 (1st Cir. 1999); *id.* at 683 (writing that "[p]ossibly *Feres* itself deserves reexamination by the Supreme Court"); *Briggs* v. *United States*, 617 F. Supp. 1399, 1402 (D.R.I. 1985), aff'd mem., 787 F.2d 578 (1st Cir. 1986); *Graham* v. *United States*, 753 F. Supp. 994, 995 & n.1 (D. Me. 1991); *Jones* v. *LaRiviera Club, Inc.*, 655 F. Supp. 1032, 1033 n.6 (D.P.R. 1987).

- From the Second Circuit: Circuit Judges Leval, Calabresi, Pierce, Mahoney, Feinberg, Van Graafeiland, Meskill, Kaufman, and Mansfield, and District Judges Raggi and Weinstein. See *Taber* v. *Maine*, 67 F.3d 1029, 1038-1049 (2d Cir. 1995); *id.* at 1038 (calling

Feres "extremely confused and confusing"); *Sanchez* v. *United States*, 813 F.2d 593, 595 (2d Cir. 1987); *Bozeman* v. *United States*, 780 F.2d 198, 200 (2d Cir. 1985); *Kohn* v. *United States*, 680 F.2d 922, 925 (2d Cir. 1982); *Veloz-Gertrudis* v. *United States*, 768 F. Supp. 38, 41 (E.D.N.Y.), aff'd mem., 953 F.2d 636 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992); *In re "Agent Orange" Prod. Liability Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2d Cir. 1984).

- From the Third Circuit: In addition to Chief Judge Becker and Circuit Judges Nygaard, McKee, and Rendell in this case, Circuit Judges Hunter, Higginbotham, Adams, Stapleton, and Sarokin, and District Judges Ditter and Gerry. See *Hinkie* v. *United States*, 715 F.2d 96, 97 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *Ocello* v. *United States*, 685 F. Supp. 100, 103 (D.N.J. 1988); *Punnett* v. *United States*, 602 F. Supp. 530, 531 (E.D. Pa. 1984); *Hall* v. *United States*, 528 F. Supp. 963, 967 (D.N.J. 1981), aff'd mem., 668 F.2d 821 (3d Cir. 1982).

- From the Fifth Circuit: Circuit Judges Thornberry, Johnson, Garwood, Goldberg, Fay, and Anderson. See *Scales* v. *United States*, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Parker* v. *United States*, 611 F.2d 1007, 1011 (5th Cir. 1980).

- From the Eighth Circuit: Circuit Judges Magill, Bright, Murphy, Richard Arnold, Bowman, and Heany, and District Judge Doty. See *Cutshall* v. *United States*, 75 F.3d 426, 429 (8th Cir. 1995) ("We note * * * that the *Feres* doctrine has been roundly criticized as unjust and unwarranted."); *Bowers* v. *United States*, 904 F.2d 450, 452 (8th Cir. 1990) (applying *Feres* bar because "we are obligated" but "with a pronounced lack of enthusiasm");

C.R.S. v. *United States*, 761 F. Supp. 665, 669 & n.1 (D. Minn. 1991).

- From the Ninth Circuit: Circuit Judges Betty Fletcher, Norris, Trott, Goodwin, Thompson, O'Scannlain, Dorothy Nelson, Reinhardt, and Canby, and District Judges Singleton and Battin. See *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991) ("[T]his circuit has accepted *Feres*, albeit grudgingly, as an ineradicable feature of our legal landscape, [but] even *Feres* concatenations must come to an end.") (internal quotation marks omitted); *Estate of McAllister* v. *United States*, 942 F.2d 1473, 1476-77 & n.2 (9th Cir. 1991) (calling *Feres* "this troubled doctrine"), cert. denied, 502 U.S. 1092 (1992); *Persons* v. *United States*, 925 F.2d 292, 295, 299 (9th Cir. 1991) (referring to "the countless reasons for feeling discomfort with *Feres*"); *Monaco* v. *United States*, 661 F.2d 129, 132 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982).

- From the Tenth Circuit: Circuit Judges Doyle, Breitenstein, and McKay. See *LaBash* v. *U.S. Department of the Army*, 668 F.2d 1153, 1156 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).

- From the Eleventh Circuit: Circuit Judges Hatchett, Godbold, and Fay. See *Elliott* v. *United States*, 13 F.3d 1555, 1559-61 (11th Cir.), vacated, 28 F.3d 1076 (11th Cir.), judgment aff'd by equally divided court, 37 F.3d 617 (11th Cir. 1994).

- From the District of Columbia Circuit: Circuit Judges Tamm and Wald, and District Judge Joyce Green. See *Hunt* v. *United States*, 636 F.2d 580, 589 (D.C. Cir. 1980).

Numerous commentators have also criticized *Feres*, arguing on the basis of detailed analyses of the text, struc-

ture, and legislative history of the FTCA that the decision was incorrect.[1]

And *Feres*'s critics have included at least three current Members of this Court. Justices Scalia and Stevens (joined by Justices Brennan and Marshall) argued in their dissent in *United States* v. *Johnson*, 481 U.S. 681, 692-703 (1987), that *Feres* was wrong when decided. Justice Ginsburg criticized *Feres* in her concurring and dissenting opinion in *Lombard* v. *United States*, 690 F.2d 215, 228-30, 233 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983), noting that "the *Feres* Court's interpretation of the FTCA continues to be questioned" and calling *Feres* "a problematic court precedent." *Id.* at 229 n.7, 233; see also *Veillette* v. *United States*, 615 F.2d 505, 506 (9th Cir. 1980) (per Fletcher, J., joined by Kennedy, J.) (stating that the court was applying

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[1] See, *e.g.*, Seidelson, *From* Feres *v.* United States *to* Boyle *v.* United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219 (1994); Wells, *Providing Relief to the Victims of Military Medicine*, 32 DUQ. L. REV. 109 (1994); Tomes, Feres *to* Chappell *to* Stanley*: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990); Bennett, *The* Feres *Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1984); Seidelson, *The* Feres *Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Rhodes, *The* Feres *Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976); Note, *Servicemembers' Rights Under the* Feres *Doctrine: Rethinking "Incident To Service" Analysis*, 33 VILL. L .REV. 175 (1988); Note, *Military Medical Malpractice and the* Feres *Doctrine*, 20 GA. L. REV. 497 (1986); Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 YALE L.J. 992 (1986); Comment, *The* Feres *Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929 (1983); Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979).

a *Feres* bar "[r]eluctantly"). The judicial and academic criticism of *Feres* is "widespread, almost universal" (*Johnson*, 481 U.S. at 700 (internal quotation marks omitted)), and uniform: aside from being unjust and unworkable, *Feres* is illegitimate. It should be overruled.

B. The *Feres* Doctrine Has Proved To Be Unworkable In Practice.

Experience has shown that the rule that *Feres* established, that service members have no recourse under the FTCA when they suffer injuries resulting from "activity incident to service," has proved to be completely unworkable. That much is clear from the conflicting decisions that have attempted — unsuccessfully — to make sense of the test and to apply it. And that alone would be reason enough to overrule the *Feres* doctrine, as this Court has not hesitated to overrule judge-made tests that were similarly unmanageable.

In *Solorio* v. *United States*, 483 U.S. 435 (1987), for instance, the Court rejected a rule that was virtually *Feres*'s twin. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), had held that court-martial jurisdiction under the Uniform Code of Military Justice depended on the "service connection" of the offense that was charged. In part because the "service connection" test "proved confusing and difficult" to apply, *Solorio*, 483 U.S. at 448, the Court in *Solorio* overruled *O'Callahan* and abolished that test, thus reversing a 20-year-old precedent. In his dissent in *O'Callahan*, Justice Harlan had predicted that the "service connection" test would spawn "infinite permutations of possibly relevant factors," as well as "create confusion and proliferate litigation." 395 U.S. at 284 (Harlan, J., dissenting). The same is true of *Feres*.

C. *Feres* Was Wrongly Decided.

Ordinarily, a case that has been the subject of such universal criticism and has proved to be so difficult to interpret and apply would be a prime candidate for the Court's attention, regardless of whether it was correct in the

first instance. But the *Feres* doctrine should be revisited for an even more fundamental reason: *Feres* was wrongly decided.

The suggestion that *Feres* correctly construed the FTCA is indefensible. In devising an exception to the FTCA for all claims based on "injuries to servicemen [that] arise out of or are in the course of activity incident to service" (340 U.S. at 146), and in doing so notwithstanding Congress's inclusion of 13 specific statutory exceptions in the FTCA, the *Feres* Court did more than merely ignore the fundamental principle of *expressio unius est exclusio alterius*. It failed to give proper weight to reams of evidence in the text, structure, and legislative history showing that Congress never intended to create such an exception to FTCA liability.

Among that evidence was: Congress's express inclusion, in the definition of those "employee[s] of the Government" whose acts may give rise to liability, of "members of the military or naval forces of the United States" (28 U.S.C. § 2671); its further specification that "acting within the scope of employment" under the FTCA means, for members of the military, "acting in [the] line of duty" (*ibid.*); and Congress's inclusion of several other exceptions that clearly contemplated tort claims by military personnel, including the discretionary function exception, the exception for claims arising in a foreign country, and, perhaps most importantly, the exception for all "claim[s] arising out of the combatant activities of the military or naval forces * * * during time of war" (*id.* § 2680(a), (j), (k)). As these provisions show, Congress plainly anticipated that the FTCA would not waive immunity for certain — but not all — claims arising out of military activities.

But in creating an exception to the FTCA for *all* claims arising out of activity incident to service, the *Feres* Court turned the process of statutory construction on its head: deriving its rule from a statute — the Military Personnel Claims Act — that had been *repealed by the FTCA*. See

Feres, 340 U.S. at 144 (relying on that Act's exclusion of "claims of military personnel 'incident to their service'"); compare Pub. L. No. 79-601, title IV, § 424, 60 Stat. 842 (1946) (repealing 31 U.S.C. § 223b). See generally Note, United States *v.* Johnson: Feres *Doctrine Gets New Life and Continues To Grow*, 38 AM. U. L. REV. 185, 202 n.121 (1988) ("The [*Feres*] Court noted that the Military Personnel Claims Act, a federal law, allowed servicemen to recovery for injuries incurred not incident to service; however, the FTCA repealed this law.").

Nor is this all. There is ample evidence in the legislative history of the FTCA to show that Congress never intended to create an exception along the lines recognized in *Feres*. As one commentator has explained, the bill that became the FTCA originally included an exception for all military suits, but that exception was dropped during the legislative process, perhaps "because of adverse criticism expressed in an earlier hearing on earlier bills." Note, 38 AM. U. L. REV. at 195 & n.66. Moreover, Congress's last-minute clarification of the exception for combat activities undercuts the rule of *Feres*:

> Originally, the Act excluded claims arising out of military activities. During debate on the bill, the House adopted an amendment adding the word "combatant" to the exception. By emphasizing that only claims arising out of combat activities were excluded from FTCA coverage, Congress presumably intended military personnel claims arising from non-combat activities to be protected.

Id. at 196 (footnotes omitted).

Feres thus has no real basis in the text, structure, or history of the FTCA. In fact, the Court no longer pretends that it does. See *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting). Instead of being grounded in the FTCA itself, the *Feres* doctrine purports to represent "three disembodied

estimations of what Congress *must* (despite what it enacted) have intended" in the FTCA. *Id.* at 695 (dissent) (emphasis in original). And "[t]hey are bad estimations at that." *Ibid.*

Thus, the Court has identified one reason underlying *Feres* as the need for a uniform law governing a service member's recovery in tort. See *Johnson*, 481 U.S. at 689. But in fact *Feres*'s "incident to service" test has had the opposite effect, allowing or barring recovery in different jurisdictions in cases with virtually indistinguishable facts. While service members are afforded government benefits when injured — another reason supposedly justifying *Feres*, see *Johnson*, 481 U.S. at 689-90 — those benefits today (unlike, perhaps, in 1950) are not nearly the equivalent in value to tort judgments, and the discrepancy keeps getting worse. See *Taber* v. *Maine*, 67 F.3d 1029, 1045 (2d Cir. 1995). Moreover, the availability of military benefits has never by itself barred tort recovery, since certain members of the military — those who, as in *Brooks*, are held not to have been hurt in "activity incident to service" — can receive benefits as well as damages in tort, with the benefits setting off the tort damages to prevent any double recovery. And while *Feres* purportedly protects the integrity of military discipline and decision making, see *Johnson*, 481 U.S. at 690-91, that integrity is equally threatened by lawsuits brought for injuries to civilians, which the *Feres* doctrine has never precluded. In sum, "neither the three original *Feres* reasons nor the *post hoc* rationalization of 'military discipline' justifies [the Court's] failure to apply the FTCA as written." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). "*Feres* was wrongly decided" (*ibid.*), and it should be overruled.

D. *Stare Decisis* Provides No Good Reasons To Deny Review.

The government will no doubt urge the Court to deny review on grounds of *stare decisis*. For at least four reasons, however, considerations of *stare decisis* are not controlling.

First. The doctrine of *stare decisis* does not bear at all on the first question presented in this petition, which asks only that *Feres* be clarified.

Second. "It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled." *Patterson* v. *McLean Credit Union*, 485 U.S. 617, 617 (1988) (per curiam). We ask for no more than that here. And in the end, an argument about *stare decisis* is really an argument about the merits. Especially in a case such as this, which presents a separate and distinct question that is independently worthy of the Court's review, it would make no sense to foreclose any reconsideration of one of the Court's prior decisions by denying the second question presented. *Stare decisis*, after all, "is a principle of policy rather than an inexorable command." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (internal quotation marks omitted).

Third. *Stare decisis* does not provide a persuasive reason to deny review of the second question, because the doctrine does not militate strongly against overruling *Feres*. Although *stare decisis* does have considerable force in the area of statutory construction, only one of the rationales originally offered in support of *Feres* (that there was no "parallel private liability" for suits by service members against the government) even "purport[ed] to be textually based" (*Johnson*, 481 U.S. at 694 (Scalia, J., dissenting)) — and that rationale is no longer deemed valid. See *Johnson*, 481 U.S. at 688-90. In reality, the *Feres* doctrine is a "judicially crafted rule," *United States* v. *Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring and dissenting), a "creature of federal common law," *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting), as opposed to an interpretation of the FTCA. *Stare decisis* is therefore of less concern.

Fourth. Even if *Feres* were grounded in a construction of the FTCA, this Court has "never applied *stare decisis*

mechanically to prohibit overruling * * * earlier decisions determining the meaning of statutes." *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 695 (1978). Rather, the Court has overruled cases involving statutory construction where appropriate. See generally *Patterson*, 485 U.S. at 618 (citing a "host of cases" in which the Court "explicitly overruled statutory precedents"); see also, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997) (overruling a 29-year old decision that was based on the construction of a statute). Two points are particularly important here. The Court has overruled prior cases involving the construction of statutes when "a precedent may be a positive detriment to coherence and consistency in the law * * * because of inherent confusion created by an unworkable decision." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). And last Term, the Court overruled a 53-year old decision interpreting a statute, holding that "it should not be followed" in part because the earlier case's "conclusion was erroneous." *Hohn*, 524 U.S. at 251. Those describe *Feres* precisely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1999

APPENDICES

APPENDIX A

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS, APPELLANT,

v.

UNITED STATES OF AMERICA.

NO. 98-7235.

United States Court of Appeals,
Third Circuit.

Argued Dec. 11, 1998.

Filed May 5, 1999.

Maurice J. Cusick (Argued), Rohn & Cusick, Christiansted, St. Croix, USVI, for Appellant.

Michael A. Humphreys, Office of United States Attorney, Christiansted, St. Croix, USVI, Curtis V. Gomez, Office of United States Attorney, Charlotte Amalie, St. Thomas, USVI, Lowell V. Sturgill, Jr. (Argued), United States Department of Justice, Civil Division, Washington, DC, for Appellee.

Before: ROTH, LEWIS, and GARTH, Circuit Judges.

OPINION OF THE COURT

LEWIS, Circuit Judge.

Appellant Shammara Richards is the wife and personal representative of the estate of Charles A. Richards, Jr. She appeals from the District Court's order dismissing her complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In particular, Mrs. Richards asks that we allow her negligence claims against the United States under the Federal Tort Claims Act ("FTCA") to go forward so that

she can attempt to recover for her husband's tragic death. Regrettably, the Supreme Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950), and the cases stemming from it prevent us from granting Mrs. Richards's request. Thus, we will affirm the District Court's judgment.

I.

Charles Richards was a private in the United States Armed Forces, stationed in Fort Knox, Kentucky. On June 26, 1995, Private Richards left work early to go home and attend to his pregnant wife.[1] Although Private Richards received permission to leave early, the Army did not issue him a pass or furlough. While driving home in his personal vehicle, Private Richards was broadsided by a five-ton military fuel truck, killing him instantly. The accident took place within the confines of the Fort Knox Army Base, at the intersection of Kentucky Highway 1638 and U.S. Highway 31 W. Kentucky Highway 1638 is a public highway that runs through an easement of land granted by the Army to the State of Kentucky, and is patrolled and maintained by the State.

Mrs. Richards filed suit under the FTCA, alleging that her husband died "as a direct and proximate result of a vehicular accident due to the negligence of the United States Army and its employees." Complaint at ¶ 3. Specifically, she alleged

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[1] The United States disputes the alleged purpose for Private Richards's early departure. It argues that Private Richards left his duty station early to go to the Fort Knox Education Center to execute forms that would have entitled him to receive tuition assistance from the Army. For purposes of ruling on the government's motion to dismiss, the District Court accepted, without deciding, that Private Richards was on his way home when he died. See *Richards* v. *United States*, 1 F. Supp. 2d 498, 500 (D.V.I. 1998). Similarly, we will accept appellant's contention that Private Richards was homeward bound at the time of the accident.

that the United States was responsible for her husband's death because it failed to properly maintain the Army vehicle which caused the collision and negligently supervised the solider who drove the vehicle. Complaint at ¶¶ 12- 13, 15-17. The District Court dismissed the suit for lack of subject matter jurisdiction, concluding that Private Richards's death was incident to his military service and thus barred by the *Feres* doctrine. This appeal followed.

We exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review de novo whether the *Feres* doctrine applies to the facts in the record. *Estate of Martinelli* v. *United States*, 812 F.2d 872, 873 (3d Cir. 1987).

II.

As a sovereign, the United States may not be sued without its consent. See *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Sovereign immunity not only protects the United States from liability, it deprives a court of subject matter jurisdiction over claims against the United States. See *id.*

In 1946, Congress passed the Federal Tort Claims Act ("FTCA"), which waived the sovereign immunity of the United States for certain torts committed by federal employees. See 28 U.S.C. § 1346(b). Under the FTCA, civil actions are permitted against the United States for:

> injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

In *Feres*, the Supreme Court limited the applicability of the FTCA as it pertains to military personnel. There, the

Court held that "the Government is not liable under the [FTCA] for injuries to [service members] where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. Although *Feres* offered several rationales for its holding,

> [in] the last analysis, *Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

United States v. *Shearer*, 473 U.S. 52, 57 (1985) (quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)) (internal quotations omitted).[2]

The Supreme Court has not articulated a specific method for determining whether an injury is "incident" to military service. Rather, it has instructed courts to examine each case "in light of the statute as it has been construed in *Feres* and subsequent cases." *Shearer*, 473 U.S. at 57. To assist with this inquiry, courts consider a number of factors including: (1) the service member's duty status; (2) the site of the accident; and (3) the nature of the service member's activity at the time of injury. See, *e.g.*, *Dreier* v. *United States*, 106 F.3d 844, 848 (9th Cir. 1997); *Schoemer* v. *United States*, 59 F.3d 26, 28 (5th Cir. 1995). A court must consider each of these factors in light of the totality of the circumstances;

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[2] The other *Feres* rationales are: (1) the "distinctively federal" nature of the relationship between the government and the armed forces; and (2) the ability of service members to receive no-fault statutory disability and death benefits through the Veterans' Administration. See *United States* v. *Johnson*, 481 U.S. 681, 689-90 (1987); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 672-73 (1977).

thus, the fact that any one factor weighs in favor of applying the *Feres* doctrine is not necessarily dispositive.

A.

At first glance, our decision in *Thomason* v. *Sanchez*, 539 F.2d 955 (3d Cir. 1976), appears to settle the issue raised in this appeal. In *Thomason*, an active member of the United States Army was struck by an automobile owned and operated by another service member while operating his motorcycle on the grounds of the Army base. See *id.* at 956. The motorcyclist filed suit against the United States under the FTCA. We held that *Feres* barred the service member's suit because he sustained his injuries while on active duty and on the military base. See *id.* at 957. In so holding, we did not examine the service member's purpose for riding the motorcycle. As in *Thomason*, Private Richards's accident took place within the confines of the Army base and while he was on active duty. Thus, *Thomason* seemingly mandates our application of the *Feres* doctrine.

Mrs. Richards contends that *Thomason* is distinguishable. Specifically, she argues that, unlike in *Thomason*, Private Richards's accident occurred while he was traveling on a public highway, maintained and patrolled by the State of Kentucky, with no military base in sight. In addition, she argues that *Thomason* incorrectly focused on the "status" of the service member, whereas subsequent Supreme Court decisions have instructed courts to examine whether the activity was "incident to military service." We have not previously considered the application of the *Feres* doctrine to these specific facts. Moreover, the two United States Courts of Appeals that have considered similar facts differ on whether *Feres* bars suit. See *Flowers* v. *United States*, 764 F.2d 759 (11th Cir. 1985); *Troglia* v. *United States*, 602 F.2d 1334 (9th Cir. 1979). Still, an examination of these decisions is instructive.

In *Flowers*, an active duty service member collided with a United States Air Force bus while "driving his civilian automobile home from a personal errand to the grocery store during his off-duty hours." 764 F.2d at 760. The accident occurred on a public highway maintained and policed by the State of Florida, but running across an easement of land granted by the Air Force. The court rejected the argument that the public accessibility of the road somehow distinguished it from the other roads running across military reservation property. See *id.* at 761. Instead, the court held that *Feres* applied because "Flowers' activity at the time of his accident, although personal, arose out of his life on the military reservation . . ." *Id.*

In *Troglia*, an active member of the Air Force brought suit under the FTCA for personal injuries suffered in an automobile accident with another motorist who had been served intoxicating beverages at the Air Force Base Non-commissioned Officers Club. See 602 F.2d at 1335. The accident took place about one-half mile outside the gate guarding access to the Air Force base, but on property owned by the United States and adjacent to the confines of the Air Force Base. The local government maintained and patrolled the road due to an easement granted by the United States. See *id.* In reversing the District Court's grant of summary judgment based on *Feres*, the court stated that "the connection between mere Government ownership of land near a base and Troglia's military service is so weak, that the accident's location should not be a controlling factor." Id. at 1339. The court noted, however, that "had the accident occurred inside the base itself, this might be a different case." *Id.*

We find that *Flowers* is more analogous to this case. As in *Flowers*, Private Richards was driving his civilian automobile home for a nonmilitary purpose at the time of the accident. Moreover, in both cases the accident occurred on military base premises, whereas in *Troglia*, the accident took

place one-half mile outside the base. Indeed, the court in *Troglia* noted the importance of this distinction when it stated that had the accident occurred inside the base itself — rather than simply on government owned property — it might have decided the case differently.

Moreover, we believe that Private Richards's activity at the time of the accident supports the application of *Feres*. Private Richards died on the grounds of the Army base while driving home from his duty station. He was not simply driving on a public road as a member of the general public. Cf. *Brooks* v. *United States*, 337 U.S. 49 (1949) (two service members on furlough injured in an off-base accident on a public highway could bring suit under the FTCA — service members were on personal business and the accident was totally unrelated to their military service). Rather, Private Richards's relationship with the military — i.e., the fact that he worked on the Army base and was leaving his duty station — is the reason he was traveling on Kentucky Highway 1638 at the time of the accident. See, *e.g.*, *Stewart* v. *United States*, 90 F.3d 102, 104-05 (4th Cir. 1996) (service member injured in on-base accident while driving from his duty station to his home to shower and change clothes before reporting to his next duty assignment was "engaged in activity directly related to the performance of [his] military obligations"); *Lauer* v. *United States*, 968 F.2d 1428, 1430 (1st Cir. 1992) (noting that departing for nonmilitary activity from duty station or returning therefrom generally are activities incident to military service). Had Private Richards been struck by a military vehicle while traveling home from a place unrelated to his military service, or on a public road outside the Army base, we may have reached a different conclusion. However, as the District Court stated, "the totality of the circumstances shows that Richards . . . 'would not, except in the event of the rarest coincidence, have been in the same place at the same time with the same purpose, had it not been incident to his active status in the military.'"

Richards, 1 F. Supp. 2d at 502 (quoting *Shaw* v. *United States*, 854 F.2d 360, 363 (10th Cir. 1988)). Thus, given the factual circumstances surrounding Private Richards's accident, we cannot escape the conclusion that his death was incident to his military service. Accordingly, we will affirm the District Court's judgment.

B.

Although *Feres* and its progeny, most notably *Thomason*, mandate that we affirm the District Court's dismissal of Mrs. Richards's complaint, we believe this result illustrates the disconnect that has come to exist between the philosophy behind *Feres* and its application. As evidence, one need only consider the fit between the facts of this case and the rationales traditionally offered to justify *Feres*.

As stated previously, the Supreme Court has explained that the *Feres* doctrine

> seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

United States v. *Shearer*, 473 U.S. 52, 57 (1985) (quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)) (internal quotations omitted). Thus, when evaluating whether certain facts weigh in favor or against applying *Feres* to bar a service member's suit, a court should consider how these facts relate to the relationship between the soldier and his or her relevant superiors. More precisely, the court should consider whether or to what extent the accident in question relates to the service member's "military duty."

One can imagine a hypothetical scenario in which the conduct or decisions of a service member's superiors necessarily would come under scrutiny during the course of a

putative lawsuit. Imagine, for instance, a case in which a soldier attempted to sue the commander of his platoon for injuries received during battle. Such a suit clearly would involve injuries that "ar[o]se out of or in the course of activity incident to [military] service." *Feres*, 340 U.S. at 146. Therefore, this suit would implicate the "special relationship" between the soldier and his superior that is contemplated in *Shearer*, 473 U.S. at 57, and *Muniz*, 374 U.S. at 162. No court would have difficulty in finding that *Feres* barred such a suit because the fit between the facts of the case and the rationales justifying *Feres* would be close.

The factual circumstances that gave rise to Mrs. Richards's suit are quite different from the service-related injuries imagined in this hypothetical. This is so because Kentucky Highway 1638, the site of the accident that took Private Richards's life, is traveled by both civilians and military personnel. Thus, it was purely a matter of chance that Private Richards's automobile, rather than a civilian's vehicle, was struck by the military fuel truck, and that Private Richards, rather than a civilian, was killed. Therefore, unlike the hypothetical above involving a soldier engaged in combat, the accident that took Private Richards's life was not necessarily related to his military duty.

Nevertheless, unlike the position in which Mrs. Richards finds herself, the spouse of a civilian who was killed in the kind of accident that caused Private Richards's death could bring suit against the Army by virtue of the Federal Tort Claims Act. Moreover, if the spouse of this civilian brought such a suit, she would be able to raise questions about whether negligence by the Army caused or contributed to the accident. And, most important for our analysis, the questions raised by the civilian's spouse might implicate the decision making of military personnel; yet, they presumably would be no less or more intrusive than if these questions were posed by Mrs. Richards. Thus, while it is true that but for Private Richards' active status in the military, he would

not have been "in the same place at the same time with the same purpose" at the time of the accident, it is not at all clear that Mrs. Richards's suit implicates the "special relationship" between her deceased husband and his superiors in the manner contemplated in *Shearer* and *Muniz*.

Thus, we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it. See *O'Neill* v. *United States*, 140 F.3d 564, 565-66 (3d Cir. 1998) (Becker, C.J., statement sur denial of the petition for rehearing); *Loughney* v. *United States*, 839 F.2d 186, 187- 88 (3d Cir. 1988); *Hinkie* v. *United States*, 715 F.2d 96, 97 (3d Cir. 1983); *Thomason*, 539 F.2d at 957; *Peluso* v. *United States*, 474 F.2d 605, 606 (3d Cir. 1973). Again, we express this concern and note that the result we reach does not actually advance the philosophy behind *Feres*.

III.

For the foregoing reasons, we will affirm the judgment of the District Court.

APPENDIX B

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS, APPELLANT,

v.

UNITED STATES OF AMERICA

No. 98-7235.

United States Court of Appeals,
Third Circuit.

June 30, 1999.

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, and GARTH,* Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by the appellant in the above- entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

RENDELL, Circuit Judge, dissenting:

This case presents yet another compelling argument for the abandonment of the *Feres* doctrine. *Feres* represents more than a "bad estimation[ ]" of what Congress intended to

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* Judge Garth's vote is limited to panel rehearing only.

do (but did not do), in the Federal Tort Claims Act. See *United States* v. *Johnson*, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting), for it is also being employed by many courts on a regular basis to deny a military employee's recovery, and to prevent the government's accountability, for injuries sustained in connection with essentially civilian activities wholly unrelated to military service. See, *e.g.*, *Flowers* v. *United States*, 764 F.2d 759, 760 (11th Cir. 1985); *Warner* v. *United States*, 720 F.2d 837 (5th Cir. 1983); *Mason* v. *United States*, 568 F.2d 1135 (5th Cir. 1978).

We have participated in this travesty, not only in this case, but also in another recent case in which we applied *Feres*, *O'Neill* v. *United States*, 140 F.3d 564, 565 (3d Cir. 1998) (Becker, C.J., dissenting from denial of petition for rehearing) ("it is difficult for me to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend.")

I agree with Chief Judge Becker's dissent in that case, and also with Justice Scalia's words in dissenting from the majority opinion in *United States* v. *Johnson*:

> The Feres Court claimed its decision was necessary to make "the entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole." 340 U.S. at 139. I am unable to find such beauty in what we have wrought.

107 S. Ct. at 2074.

I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres* v. *U.S.*, 340 U.S. 135.

Chief Judge Becker and Judges Nygaard and McKee join in this dissent.

APPENDIX C

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR. AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

NO. 1997-0034F.

District Court, Virgin Islands, D. St. Croix.

March 27, 1998.

Lee J. Rohn, Christiansted, VI, Jeffrey Moorhead, Christiansted, VI, for Plaintiff.

Michael A. Humphreys, Asst. U.S. Atty. Christiansted, VI, Corey L. Bradley, Major, U.S. Army U.S. Legal Services Agency Arlington, VA, for Defendant.

MEMORANDUM OPINION

FINCH, District Judge.

The Plaintiff sues for damages arising from the death of Private Charles A. Richards, Jr. contending that this Court has jurisdiction under the Federal Tort Claims Act ("FTCA").[1] 28 U.S.C.A. § 1346(b). The Defendant,

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[1] The Federal Tort Claims Act permits civil actions against the United States:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant

United States of America, moves to dismiss for lack of subject matter jurisdiction, citing the *Feres* doctrine.[2] The *Feres* doctrine, which derives its name from the Supreme Court opinion *Feres* v. *United States*, is an exception to the waiver of immunity granted in the FTCA when a plaintiff's alleged injuries or death "arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950).

I. Background

Richards, a private in the United States Armed Forces, stationed in Fort Knox, Kentucky, died in uniform on June 26, 1995 when his privately owned vehicle was struck by an Army five-ton truck operated by a member of the United States Army on Kentucky Highway 1638. Although Kentucky Highway 1638 is a public road, it runs through an easement of land granted by the Department of Army to the State of Kentucky.

According to the Plaintiff's statement of facts, Richards had been allowed to leave his duty station early that day to

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in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b).

[2] The United States also filed motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and for summary judgment pursuant to Fed. R. Civ. P. 56 premised on the *Feres* doctrine. Rules 12(c) and 56 are not applicable to claims of immunity under the *Feres* doctrine. In cases in which the United States is immune from suit under the FTCA, and the FTCA is the only basis for federal jurisdiction, the courts lack subject matter jurisdiction. Such suits should be dismissed for lack of subject matter jurisdiction under 12(b)(1). *Dreier* v. *United States*, 106 F.3d 844, 847 (9th Cir. 1996); *Loughney* v. *United States*, 839 F.2d 186, 188 n.3 (3d Cir. 1988). Thus, the United States' motions for judgment on the pleadings and summary judgment are not considered.

attend to his pregnant wife. The United States agrees that Richards was allowed to leave his duty station early but asserts that Richards was given such permission to permit him to go to the Education Center in Fort Knox to execute forms that would have entitled him to receive tuition assistance from the United States Army. Although Richards was allowed to leave early he was issued no pass or furlough.

Thus, the parties dispute Richards' travel intentions. Although the Court may weigh the evidence to determine whether Richards' was heading home or to the Education Center, see *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines, Inc.*, 673 F.2d 700, 711 (3d Cir. 1982), such an exercise would be unnecessary if even given the Plaintiff's view that Richards was homeward bound, jurisdiction were to fail. Therefore, the Court begins its jurisdictional analysis by taking the Plaintiff's allegations as true. The Court considers that Richards was indeed en route home to tend to his pregnant wife at the time he was killed.

II. The Law

1. *Feres* Doctrine Jurisprudence

The United States, as a sovereign, is immune from suit except as it consents to be sued. *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Sovereign immunity not only protects the United States from liability, it deprives the Court of subject matter jurisdiction over the claims against the United States. *Id.* In 1946, Congress enacted the FTCA which, with certain exceptions, waived sovereign immunity for common law torts committed by federal employees acting within the scope of their employment. 28 U.S.C.A. § 1346(b). However, in its seminal decision *Feres* v. *United States*, the Supreme Court held that military personnel are barred from suing the United States for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146.

The *Feres* doctrine has three rationales: First, the Supreme Court is cautious of "involv[ing] the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* (quoting *United States* v. *Shearer*, 473 U.S. 52, 59 (1985)); see *Loughney* v. *United States*, 839 F.2d 186, 187 (3d Cir. 1988). Second, applying state tort law which varies depending on the situs of the incident conflicts with the uniform federal nature of the relationship between the service member and the Government. *United States* v. *Johnson*, 481 U.S. 681, 689 (1987); *Loughney*, 839 F.2d at 187. Finally, because service members are eligible for statutory disability and death benefits, Congress' purpose in enacting the FTCA of providing remedies is not served by extending the FTCA to service members. *Johnson*, 481 U.S. at 690.

2. *Feres* Doctrine Practice

To assist in determining whether the injuries occurred incident to service, courts consider the totality of the circumstances including: (1) the service member's duty status; (2) the situs of the injury; (3) and the activity the service member was performing. See, *e.g.*, *Schoemer* v. *United States*, 59 F.3d 26, 28 (5th Cir. 1995); *Flowers* v. *United States*, 764 F.2d 759, 760-61 (11th Cir. 1985). A particular factor or combination of factors may be dispositive. For example, if a service member is injured on a military base, the *Feres* doctrine generally bars suit. *Coffey* v. *United States*, 324 F. Supp. 1087, 1088 (S.D. Cal. 1971) (finding that although service member held liberty card and was exiting base to off-post liberty, because accident occurred on base, situs of accident barred FTCA suit), aff'd, 455 F.2d 1380 (9th Cir. 1972). When the totality of the circumstances show that the *Feres* doctrine bars suit, the Court may dismiss the suit without considering the underlying *Feres* doctrine rationales. *Loughney*, 839 F.2d at 188 (holding that when military status of the service member was dispositive, no case-by-case inquiry into whether claim would involve judicial intrusion

into military affairs was warranted). On the other extreme, even when the three-factor totality of the circumstances test strongly indicates that the *Feres* doctrine does not bar suit, the Court must look to the *Feres* doctrine rationales before permitting suit. See *Shearer*, 473 U.S. at 54, 57. For example, in *United States* v. *Shearer*, although a service member was killed while off-duty, off-base, and while not performing any military related activity, because the military status of the tortfeasor could "require[] the civilian court to second-guess military decisions," the *Feres* doctrine rationale barred suit. *Id.*

III. Case Analysis

A. Totality of the Circumstances

The Plaintiff argues that the three factors generally considered in determining the totality of the circumstances conclusively show that Richards' death did not occur incident to service. According to the Plaintiff, Richards was in off-duty status, on a public road, and performing an act not related to his military duties — going home. Although little Third Circuit guidance is available, the Ninth Circuit in the factually similar case, *Troglia* v. *United States*, held that suit by an off-duty service member injured while possibly "returning to the base after enjoying a short period of liberty," on a public road passing across an easement on military property, may not be barred by the *Feres* doctrine. 602 F.2d 1334, 1339-40 (9th Cir. 1979) (remanding to district court to determine service member's status and activity at time of injury). In contrast, the Eleventh Circuit found a *Feres* bar in *Flowers* v. *United States*, when an off-duty service member, headed home from the grocery store was injured on a public road running through an easement on military property. 764 F.2d at 761. The lack of Third Circuit precedent together with these conflicting rulings make the law as applied to these facts unclear. Thus, the Plaintiff's argument that the

three-factor incident to service test conclusively permits suit in this case is without merit.

If each of the three factors is individually analyzed, the three- factor test points more strongly toward finding a *Feres* bar than toward permitting suit. For the purposes of the *Feres* doctrine, whether an active duty service member is off-duty or on-duty generally is immaterial. *E.g.*, *Skees* v. *United States*, 107 F.3d 421, 425 (6th Cir. 1997) (holding that "status as an active duty service person, not whether he was on or off-duty at the time of his death, is controlling"); *Bozeman* v. *United States*, 780 F.2d 198, 200 (2d Cir. 1985) (noting active duty status continues when service member on liberty or leave); *Warner* v. *United States*, 720 F.2d 837, 839 (5th Cir. 1983) (holding that "[o]ne with only an unexercised right to a pass or who is only off duty for the day usually is held to be acting 'incident to service.' "); *Mason* v. *United States*, 568 F.2d 1135, 1136 (5th Cir. 1978) (holding that although service member was off-duty and on his way home, because he was on active duty and on base, he was "still subject to all military regulations and discipline and was readily available for emergency service or temporary duties"). But cf. *Parker* v. *United States*, 611 F.2d 1007, 1014 (5th Cir. 1980) (holding that right to be off-duty for four days more like furlough than mere release from day's duties). Furthermore, when an active status service member is injured in a vehicular accident on a military reservation, courts generally find a *Feres* bar.[3] See, *e.g.*, *Shaw* v. *United States*, 854 F.2d 360, 363 (10th Cir. 1988); *Warner*, 720

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[3] Whether an incident involving an active duty service member occurring on a public road, such as Kentucky Highway 1638, running on an easement across a military reservation, arises out of or is in the course of military activity for the purpose of a *Feres* analysis, has not been decided by the Third Circuit and the Ninth Circuit and Eleventh Circuit are split on this question. Compare *Troglia*, 602 F.2d at 1339, with *Flowers*, 764 F.2d at 761.

F.2d at 839; *Coffey*, 324 F. Supp. at 1088. Finally, the activity of leaving the duty station after work and returning to the duty station for work is generally considered an activity incident to military service. *Lauer* v. *United States*, 968 F.2d 1428, 1430 (1st Cir. 1992) (holding that leaving base for non- military activity and returning therefrom is usually incident to service); *Shaw*, 854 F.2d at 363 (holding that fact that service member was on post and on his way to work was directly connected to military service). As in *Shaw* v. *United States*, in which a service member was struck by an Army cargo truck on base on his way to work, the totality of the circumstances shows that Richards, like Shaw, "would not, except in the event of the rarest coincidence, have been in the same place at the same time with the same purpose, had it not been incident to his active status in the military." 854 F.2d at 363.

The application of each of the three factors to the instant case strongly indicates that the *Feres* doctrine bars suit. However, because the two circuits that have considered factually similar cases are split and because the Third Circuit has not had occasion to review a factually similar case, the Court, in an abundance of caution, finds the three factor analysis inconclusive.

B. Consideration of the *Feres* Doctrine Rationales

Because the three factor incident to service test generally applied in evaluating the totality of the circumstances does not conclusively bar suit, the Court considers the *Feres* doctrine rationales. As discussed, the *Feres* doctrine is designed to prevent unnecessary judicial intrusion into military affairs and to protect the Government from responding to tort actions under varying state laws. Further justification for the *Feres* bar is the uniform compensation provided to service members under federal law. These rationales, considered in turn, show that the *Feres* doctrine bars this suit.

1. Judicial Intrusion into Military Affairs

What constitutes judicial intrusion into military affairs has been broadly construed. Some courts have held that a collision that merely involves military eyewitnesses and military physicians, without any further questioning of military decision-making, sufficiently involves the judiciary intruding on military affairs to warrant barring suit under the *Feres* doctrine. For example, in *Shaw*, despite acknowledging that "the present case may not involve a 'decision of command,' " the court held that concern for judicial intrusion into military affairs supported barring suit because "this case may require military personnel, . . . military eyewitnesses to the accident, and military medical personnel who treated Mr. Shaw and diagnosed the extent of his injuries 'to testify in court as to each other's decisions and actions.' " 854 F.2d at 365 (quoting *Shearer*, 473 U.S. at 58); see also *Stewart* v. *United States*, 90 F.3d 102, 106 (4th Cir. 1996) (holding that *Feres* doctrine rationale supported barring suit involving collision because military personnel could be required to testify).

Other courts have applied the *Feres* doctrine more narrowly, considering whether the claims were of the type that would involve the courts in questioning a traditional military function. For example, in *Taber* v. *Maine*, because the plaintiff only alleged the negligence of the drunk driver and no claims of negligent supervision by military personnel were made, the Second Circuit held that military discipline was not implicated. 67 F.3d 1029, 1052 (2d Cir. 1995). Similarly in *Dreier*, the Ninth Circuit found no *Feres* doctrine bar because the case did not involve potential interference with decision-making of a traditional military nature:

> This case makes no allegations of inadequate military supervision or training, but rather alleges the same type of negligence that could be alleged against a completely private [facility]. . . . This circuit has not been so con-

> cerned in questioning aspects of the operation of a military base that are not related to traditional military functions.

106 F.3d at 854 & n.9.

The case at bar involves intrusion of the judiciary into military discipline even if this second more stringent test is applied. In her complaint, the Plaintiff claims inter alia:

> Defendant United States through its negligence failed to properly maintain its vehicle, United States Army Truck . . . involved in the vehicular accident which gives rise to this Complaint
>
> . . .
>
> Defendant United States negligently allowed [service member] to operate a five-ton truck knowing that he was not licensed to drive [such] truck. . . . Defendant negligently ordered [service member] to drive the truck knowing that he did not possess the requisite skill or experience to safely operate the vehicle.

Some of the allegations in this case are similar to those in *Sanchez* v. *United States*, 878 F.2d 633 (2d Cir. 1989). In *Sanchez*, the plaintiff alleged that his injuries were caused by the negligent servicing of a car by a service station owned and operated by the government. *Sanchez*, 878 F.2d at 634. Even though the injuries occurred while Sanchez was off-duty and off base, the *Feres* doctrine was found to apply because "establishment of Sanchez's claim would require Marine Corps officers to testify about their policies in hiring employees for the repair station and in running the station." *Id.* at 688.

In this case, military officials would be questioned not only with respect to their maintenance policies, but also with respect to decisions regarding personnel supervision and discipline as in *Shearer*. Thus, this suit is barred under the FTCA because the Plaintiff's allegations are "the *type* of

claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." See *Shearer*, 473 U.S. at 59 (emphasis in original).

2. Federal Relationship and Uniform Compensation

The remaining *Feres* doctrine rationales also favor a *Feres* bar. Richards had a distinctively federal relationship to the government and the service member allegedly responsible for his death; his active duty status in the armed forces and the fact that the incident occurred while he was on his way home from his work on base suggest this federal relationship. In light of this federal relationship, the *Feres* doctrine prevents the United States from having to respond to a tort action based fortuitously on the tort law of Kentucky, the state in which Richards was killed.

Instead, the United States has provided "simple, certain, and uniform compensation" to Richards' family in the form of extensive benefits. *Feres*, 340 U.S. at 144. Richards' widow received $150,000 from Servicemen's Group Life Insurance and $6,000 in a death gratuity from the United States. She and her children receive over $1,200 per month in dependency and indemnity compensation. In addition Richards' family is entitle to numerous other survivor benefits, including education stipends, medical care, federal civil service hiring preferences, and home loan guarantees.

Thus, all three *Feres* doctrine rationales support a finding that the Plaintiff's suit is barred by the *Feres* doctrine.

IV. Conclusion

Courts have recognized that

> in recent years the [Supreme] Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's

> *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing even and the essential defense/combat purpose of the military activity from which it arose.

Major v. *United States*, 835 F.2d 641, 644 (6th Cir. 1987) (emphasis in original); see *Stewart*, 90 F.3d at 105; *Shaw*, 854 F.2d at 364. The *Feres* doctrine has been expanded such that "practically any suit that implicates the military judgments and decisions runs the risk of colliding with *Feres*." *Jackson*, 110 F.3d at 1487 (citations omitted).

In this case, the service member's status, the location of the cause of the injury and the military nature of the service member's activity at the time of the incident, strongly indicate that the *Feres* doctrine bars suit. However, because other circuits examining similar facts are split and the Third Circuit has not yet reviewed such a case, these facts are found non-dispositive. Therefore, the *Feres* doctrine rationales are considered. Because the Plaintiff's allegations would require the judiciary to involve itself in questions of military discipline and decision-making, and the other *Feres* doctrine rationales also support a finding of immunity, this suit is barred under the *Feres* doctrine. Since the underlying cause of action is barred by the *Feres* doctrine, the Plaintiff's derivative actions are similarly barred. *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983).

APPENDIX D

28 U.S.C. § 1346:

* * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily

or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. § 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * *

28 U.S.C. § 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false

arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

APPENDIX E

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS, PLAINTIFFS,

V.

UNITED SATES OF AMERICA, DEFENDANT.

CIVIL NO. 1997/

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

VERIFIED COMPLAINT

COME NOW Plaintiffs, by and through undersigned counsel, and as and for Plaintiffs' Complaint, allege and state the following:

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C., Chapter 171, § 2401 and § 2674 et. seq. and the Federal Tort Claims Act.

2. The amount in controversy exceeds the sum of $50,000.00, exclusive of costs and fees.

3. Charles A. Richards, Jr., died on June 26, 1995, as a direct and proximate result of a vehicular accident due to the negligence of the United States Army and its employees; and his wife, Shammara Richards, a resident of St. Croix, Virgin Islands, has been appointed his personal representative for the purpose of continuing this civil suit.

4. Defendant United States Army is a body politic which oversees the operation of all military bases, including the U. S. Armor Center at Fort Knox, Kentucky.

5. The beneficiaries of the Estate of Charles A. Richards, Jr., are as follows:

a. Shammara Richards, spouse;

b. Shanee A. Richards, daughter;

c. Charles Richards, son;

d. Cecile Richards, mother;

e. Charles Richards, father;

f. Alexander Richards, brother;

g. Basil Richards, brother;

h. Valencia Richards, sister;

i. McDonald Richards, brother;

j. Bernadette Bess, sister;

k. Charlese Duparl, sister; and

l. Allen Duparl, brother.

6. On or about June 26, 1995, Charles A. Richards, Jr., was driving near the intersection of Kentucky Highway 1638 and US 31 W in Muldraugh, Kentucky.

7. Decedent, who was on personal business, Charles A. Richards, Jr.'s vehicle was impacted broadside and crushed by a five-ton United States Army cargo truck.

8. As a direct and proximate result of the impact, Charles A. Richards, Jr., died of his injuries and his heirs have been deprived forever of his support and consortium.

9. Plaintiff, Shammara Richards, wife of Charles A. Richards, Jr., who was pregnant at the time of the accident

suffered extreme anguish and damages as a result of her husband's untimely death.

10. Defendant United States Army oversees the operation of the Army base in Fort Knox, Kentucky; and employs and pays the salaries of servicemen stationed there.

11. Defendant United States supplies, maintains and services all vehicles utilized at its Fort Knox Army base.

12. Defendant United States through its negligence failed to properly maintain its vehicle, United States Army Truck Cargo 5 Ton 6x6 M813A1, VIN NL08NZC32910291 involved in the vehicular accident which gives rise to this Complaint.

13. Defendant United States allowed the above-described vehicle to be operated on the public roadways in an unsafe, defective condition, to include but not be limited to:

a. Defective front brakes;

b. Defective air gauge;

c. Damaged tail lamps;

d. Damaged rear turn lamps;

e. Inoperable horn;

f. Defective battery gauge;

g. Unable to be driven long distances;

h. Contaminated brake fluid; and

i. Defective master cylinder.

14. Defendant United States qualifies servicemen in general to operate various classes and weights of vehicles.

15. Defendant United States negligently allowed SPC Potts to operate a five-ton truck knowing that he was not licensed to drive an 800 series five-ton truck of the type and

description that he drove the day of the subject accident without regard to the safety of other drivers on the public roadways.

16. Defendant negligently ordered SPC Potts to drive the truck knowing that he did not possess the requisite skill or experience to safely operate the vehicle.

17. SPC Potts, while he was in the course and scope of his employment with Defendant, negligently operated the vehicle such that it collided with the vehicle being driven by Mr. Richards.

18. As a direct and proximate result of the negligent acts and omissions of Defendant, Decedent suffered pain and suffering and then died and Plaintiffs suffered losses, mental anguish, pain and suffering and loss of enjoyment of life, loss of companionship and contribution of Decedent and all other damages allowable under the wrongful death statute.

WHEREFORE, Plaintiffs pray for damages as they may appear and for such other relief as this Court deems fair and just.

JURY TRIAL DEMANDED AS TO ALL ISSUES.

LAW OFFICES OF ROHN & CUSICK
Attorneys for Plaintiffs

DATED: 3/26/97 /s/ Lee J. Rohn

Lee J. Rohn, Esquire
1101 King Street - Suite 2
Christiansted, St. Croix
Virgin Islands 00820

VERIFICATION

I, **SHAMMARA RICHARDS**, being duly sworn, hereby verify that I am the Plaintiff in the above-captioned matter and I have read the Verified Complaint filed herein and all statements contained herein are true and correct.

/s/ Shammara Richards

SHAMMARA RICHARDS, Individually and As Personal Representative of the ESTATE OF CHARLES A. RICHARDS, JR., and as Guardian and Next of Kin of SHANEE A. RICHARDS and CHARLES RICHARDS

SUBSCRIBED and SWORN TO BEFORE
me this 25th day of March, 1997.

/s/_____
Notary Public

APPENDIX F

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST, CROIX

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

CIVIL NO. 97-0034

FEDERAL TORT CLAIMS ACTION

ANSWER OF DEFENDANT, UNITED STATES OF AMERICA

COMES NOW the United States of America, by and through the United States Attorney for the District of the Virgin Islands, and answers the Plaintiffs' Complaint as follows:

1. The allegations of paragraph No. 1 of the Complaint state legal conclusions to which the Defendant is not required to admit or deny. However, to the extent that answer is, otherwise, required, the allegations of paragraph No. 1 of the complaint are denied.

2. Defendant denies the allegations of paragraph No. 2.

3. Defendant admits that Charles A. Richards, Jr., died on June 26, 1995, but is without sufficient knowledge or information to either admit or deny the remaining allegations of paragraph 3. However, to the extent that an answer is, otherwise, required, the allegations of paragraph No. 3 are denied.

4. Defendant admits it is an agency of the United States that oversees the operation of the U.S. Army Armor Center at Fort Knox, Kentucky, but denies the remaining allegations in paragraph No. 4.

5. Defendant is without sufficient knowledge or information to either admit or deny the allegations of paragraph No. 5, but to the extent that an answer is required the allegations are denied.

6. Defendant admits the statements contained in paragraph No. 6.

7. Defendant admits that Charles A. Richards, Jr.'s vehicle was involved in a collision with the United States Army 5-ton cargo truck on June 26, 1995, but denies the remaining allegations of paragraph No. 7.

8. Defendant denies the allegations of paragraph No. 8.

9. Defendant is without sufficient knowledge or information to either admit or deny the allegations of paragraph No. 9, but to the extent that an answer is, otherwise, required, the allegations are denied.

10. Defendant admits the statements contained in paragraph No. 10.

11. Defendant denies the allegations of paragraph No. 11.

12. Defendant denies the allegations of paragraph No. 12.

13. Defendant denies the allegations of paragraph No. 13.

14. Defendant admits the statements contained in paragraph No. 14.

15. Defendant denies the allegations of paragraph No. 15.

16. Defendant denies the allegations of paragraph No. 16.

17. Defendant admits that SPC Potts was acting within the course and scope of his federal employment at the time of the accident that is the subject of this litigation, but denies the remaining allegations of paragraph No. 17.

18. Defendant denies the allegations of paragraph No. 18.

19. Each and every allegation not previously admitted or otherwise qualified is, hereby, expressly denied.

FIRST AFFIRMATIVE DEFENSE

20. Plaintiffs' complaint fails to state a claim from which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

21. This Court lacks subject matter jurisdiction over the claims raised by the Plaintiffs' complaint.

THIRD AFFIRMATIVE DEFENSES

22. Plaintiffs' cause of action under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(B) and 2671-2680 is barred by the *Feres* Doctrine, *Feres* v. *United States*, 340 U.S. 135 (1950).

FOURTH AFFIRMATIVE DEFENSE

23. Any injuries which plaintiffs may have sustained were caused by the contributory negligence of the decedent.

WHEREFORE, having fully answered, defendant, United States of America, prays as follows:

a) That the plaintiffs' action be dismissed with prejudice;

b) That the defendant, United States of America, be awarded the costs incurred in the defense of this action; and

c) That the Court enter such other relief as it deems just and proper.

Respectfully submitted this 1st day of June 1997.

JAMES A. HURD, JR.
United States Attorney

/s/ Michael A. Humphreys
Michael A. Humphreys
Assistant U.S. Attorney
1108 King Street, Ste. 201
Christiansted, VI 00820
809 773-3920

Of Counsel:

CAPTAIN COREY L. BRADLEY
Department of the Army
Office of the Judge Advocate General
901 North Stuart Street
Arlington, Virginia 22203
(703) 696-1637

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer was served on Plaintiffs' counsel, Lee J. Rohn, Esq., 1101 King Street, Suite 2, Christiansted, by placing it in her Box at the District Court's Office this 2th day of June, 1997.

/s/
Legal Assistant

Supreme Court, U.S.
FILED
DEC 28 1999
OFFICE OF THE CLERK

(2)

No. 99-731

In the Supreme Court of the United States

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE SUPPORTING PETITIONER

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Brief of Amici Curiae
Bonnie A. O'Neill and Edmund J. O'Neill
In Support of Certiorari

Bonnie A. O'Neill and Edmund J. O'Neill submit this brief as *amici curiae* in support of the Petition for Certiorari in this case.[1] Both petitioner and respondent have consented in writing to the filing of this brief.

Interest of the Amici

Bonnie and Edmund O'Neill are the parents of Kerryn O'Neill, an officer in the United States Navy who was murdered as she sat in her apartment watching television with a friend. The circumstances of her death are set out in *O'Neill v. United States,* 140 F.3d 564 fn.** (3d Cir. 1998)(Statement of Becker, C.J., joined by Sloviter and McKee, JJ., Sur Denial of Rehearing) as follows:

> O'Neill, a Naval officer, was murdered by her former fiancé, Ensign George Smith. O'Neill met Smith at the United States Naval Academy where they both attended school. After graduation O'Neill was assigned to a naval base in San Diego. Coincidentally, Smith was sent to the same base several months later in preparation for a tour of duty on a submarine. Shortly after Smith's arrival in San Diego, O'Neill broke off their engagement and he began to stalk her. One night while O'Neill was sitting in her on-base apartment watching a movie with a friend, Smith came to her building, shot and killed her and her companion and then killed himself.

[1] Statement pursuant to this Court's Rule 37.6. No counsel for a party wrote this brief in whole or part. No person or entity other than the amici or their counsel has made any monetary contribution to preparation or submission of this brief.

> Smith had been given a battery of psychological tests to determine his psychological fitness for submarine duty. On this "Subscreen" test he had scored four standard deviations above normal levels (in the 99.99 percentile) for aggressive/ destructive behavior. He had also scored more than two standard deviations above normal levels in six other categories — including impulsive and manipulative behavior. Under Naval procedures, these results should have been forwarded to the Department of Psychiatry at the Naval Hospital for a full psychological evaluation. O'Neill's family, with considerable force, urges that the Navy was negligent in failing to follow-up on these extreme test results.

The O'Neills sued the United States under the Federal Tort Claims Act for damages resulting from the death of their daughter. Their case was dismissed pursuant to the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), and the dismissal was affirmed by the Third Circuit, which also denied rehearing en banc, although Chief Judge Becker and Judges Sloviter and McKee dissented from that denial and "urge[d] the Supreme court to grant *certiorari* and reconsider *Feres*." *Id.*, 140 F.3d at 566. However, this Court denied certiorari. 119 S. Ct. 404 (1998).

Despite their loss in litigation, the *amici* remain concerned at the negative effect of the *Feres* doctrine on other service members and their families where service members are injured or killed by the negligence of employees of the military. They believe that they should use the knowledge and experience they gained in their own unsuccessful litigation in the attempt to assist others in seeking to overturn the *Feres* doctrine.

A History of *Feres* and its Changing Rationales

In 1946 Congress passed the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, to allow suits in tort against the government based on the negligent acts or

omissions of its employees. As enacted, the FTCA permits the government to be sued for peacetime injury to members of the military. *Id.* at § 2671. The statute specifically excepts from its coverage claims for injuries "arising out of *the combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*." 28 U.S.C. § 2680(j) (emphasis added). Relying on this plain language, in *Brooks v. United States*, 337 U.S. 49 (1949), the Court confirmed that an active-duty servicemember may sue the government under the FTCA for injuries caused by the negligence of members of the armed forces where the injuries did not arise out of the injured servicemember's military service. There, the Court permitted recovery to two servicemembers for injuries and death as a result of their car's collision with an Army truck.

One year later, in *Feres v. United States*, 340 U.S. 135, the Court created a broad exception to the government's general liability under the FTCA where the servicemember's injury arises out of or is "in the course of activity incident to service." *Id.* at 146. The Court distinguished *Brooks* by pointing out that while the plaintiffs there were in the military and the injury was caused by the military, their injury did not arise out of their military service. *Id.* In *Feres*, the Court was presented with two cases involving alleged medical malpractice by Army doctors and one involving a defective heat plant that allegedly caused a fire in a barracks. The Court posited three rationales for its holding. First, the Court stated that the FTCA permits suits against the government only "in the same manner and to the same extent as a private individual under like circumstances", 28 U.S.C. § 2674, and there is no "parallel" private liability for injuries caused by the military, which is a uniquely governmental function. 340 U.S. at 141-42. Second, Congress could not have intended variable local tort law to govern the "distinctively federal relationship" between the government and its servicemembers. *Id.* at 142-44. Third, Congress also could not have intended to permit servicemembers to bring FTCA

suits where "simple, certain, and uniform" veterans' benefits are available for the same injuries. *Id.* at 144-45.

Soon after *Feres* was decided the Court departed from the original justifications for its holding. The Court first advanced a new policy rationale for *Feres*, namely that Congress could not have intended the federal courts to entertain FTCA suits brought by servicemembers where to do so would undermine military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954). The Court then abandoned the first rationale for *Feres* – the only one that purported to be based on the text of the FTCA – by rejecting the original "parallel" private liability ground. Thus, in *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), the Court allowed recovery for negligent activities (Coast Guard operation of a lighthouse and Forest Service firefighting) that were uniquely governmental.

Over succeeding years, the Court has not been able to identify a statutory basis or a consistent rationale for the *Feres* doctrine, and the rationales said to underlie the doctrine have continued to shift. The original notion that it would be unfair to the plaintiff (but apparently not to the government) to allow a servicemember's recovery to turn on variable local tort law later evolved into a concern about the military's need for uniformity in its affairs. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977). The Court then abandoned, as "no longer controlling", the original considerations of variable local law and the availability of veterans' benefits. *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985). But a mere two years later the Court revived these same justifications in support of its holding in *United States v. Johnson*, 481 U.S. 681, 689-90 (1987). Moreover, the Court had also said that *Feres* is "best explained" by the need to prevent intrusion into sensitive military decision-making and discipline. *Shearer*, 473 U.S. at 57 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)). But the Court has since permitted suits by civilians that question the

soundness of military judgments, create the same risk of non-uniformity of rules applying to the military, and intrude into the same issues of military discipline. *Sheridan v. United States*, 487 U.S. 392 (1988). In short, after nearly fifty years the *Feres* doctrine is a series of decisions in search of a rationale.

ARGUMENT

The continued existence of the *Feres* doctrine raises a number of important issues concerning the underpinnings of the doctrine with which this Court has not dealt. Because *Feres* is a decision of this Court, the lower courts do not have the power to question or re-examine the support for, and the rationale of, the decision (although a large number of circuit court judges have criticized the Rule. Pet. 20 ff.). But as the Petition ably demonstrates, the courts of appeals vary greatly in their understanding and interpretation of the *Feres* doctrine. It is the submission of the *amici* that this confusion cannot be eliminated unless this Court grants certiorari and re-examines the fundamentals of the *Feres* doctrine.

1. Because the Feres Doctrine no longer has any foundation in the text of the Federal Tort Claims Act, this Court should examine whether the doctrine has any appropriate foundation.

In *Feres* itself, the Court advanced a rationale based on the text of the Federal Tort Claims Act. It held that the FTCA permits suits against the government only "in the same manner and to the same extent as a private individual under like circumstances", 28 U.S.C. § 2674, and there is no "parallel" private liability for injuries caused by the military, which is a uniquely governmental function. 340 U.S. at 141-42. However, soon after *Feres* was decided the Court abandoned that statutory rationale for the holding – the only one that purported to be based on the text of the FTCA – by rejecting the "parallel" private liability ground. *United States v. Muniz*, 374 U.S. 150, 159 (1963). *See Indian Towing Co.*

v. United States, 350 U.S. 61, 64-65 (1955) and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), where the Court allowed recovery for negligent activities (Coast Guard operation of a lighthouse and Forest Service firefighting) that were uniquely governmental.

Accordingly, it does not appear that there is now any basis for the *Feres* doctrine in the text of the Federal Tort Claims Act. While the Court has not directly addressed the issue, in the dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 694-95 (1987), Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, demonstrated that point in a discussion to which the opinion of the Court does not respond. Moreover, in *Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993), Justice Kennedy, concurring and dissenting in part, distinguished cases decided under the *Feres* doctrine by pointing out that *Feres* is not a statutory doctrine but one of federal common law.[2] Nor does the United States assert to the contrary in *Feres* cases. Even though the O'Neills argued the lack of any statutory text to support *Feres* in their petition for certiorari (October Term 1998, No. 98-194, at pp.11-12), the United States did not claim otherwise in its Brief in Opposition.

Therefore, the *Feres* doctrine lacks statutory support and appears to be a judicially created limitation on a Congressionally created right to sue. But this Court has repeatedly held that it is "bound to respect th[e] choice[s]" of Congress in drafting statutes; and the Court "[is] not to

[2] Whether the doctrine constituted a proper use for judge-made federal common law Justice Kennedy was not called upon to decide. It is quite clear, however, that it is not. In *Northwest Air Lines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) this Court held that apart from standard interpretation of constitutional and statutory provisions, the Court may fashion federal common law only "in the absence of legislation, . . . subject to the paramount authority of Congress" (internal quotation omitted). As we note below, this Court has long held that it lacks the power to alter the effect of a statute of Congress.

rewrite the statute based on [its] notions of appropriate policy." *BankAmerica Corp v. United States*, 462 U.S. 122, 140 (1983). Indeed, this Court emphasized that very point in construing the Federal Tort Claims Act itself in *Rayonier v. United States*, 352 U.S. at 320 ("There is no justification for this Court to read exemptions into the Act beyond those provided by Congress"). Although this Court has found a number of policies, which have shifted back and forth over time, that it has held support the *Feres* doctrine (*see* pp. 2-4, *supra*), the fact is that the Court lacks power to condition or limit a statutory provision like the Federal Tort Claims Act on policy grounds, regardless of how wise the Court may think its version of the policy is. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 557-58 (1978). For this reason the Court should grant certiorari to identify the source, if any, of the continued vitality of the *Feres* doctrine. *See also, e.g., Brogan v. United States*, 118 S. Ct. 805, 811-12 (1998).

2. The Separation of Powers doctrine further advises against continuation of *Feres*.

Because the *Feres* doctrine is not based upon any statute of Congress and is a judge-made limitation on a statutory right to sue, it also constitutes a reach by this Court into other areas reserved to Congress by the Constitution. While to support *Feres* the Court places great weight on the supposed negative impact of tort liability on military relationships and discipline (*Shearer*, 473 U.S. at 57-58), it is to Congress, and not the Court, that the Constitution gives the authority "[t]o make rules for the Government and Regulation of the land and naval forces." As the Court has recognized, Congress has the Constitutional authority to determine the "rights, duties, and responsibilities" of the military, "including regulations, procedures, and remedies related to military discipline." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). The Court's concern that in the Federal Tort Claims

Act the Congress has not sufficiently accounted for those matters is thus out of place.

The Court further owes special deference to Congress's judgment regarding the scope of its waiver of sovereign immunity in the Federal Tort Claims Act. Only Congress can determine whether and to what extent the sovereign immunity of the United States may be waived. *United States v. Nordic Village Inc.*, 503 U.S. 30, 33-34 (1992). The Court lacks the power "to narrow the waiver that Congress intended," *United States v. Kubrick*, 444 U.S. 111, 118 (1979), or to "import immunity back into a statute designed to limit it." *Indian Towing*, 350 U.S. at 69.

It therefore appears that in maintaining the nonstatutory *Feres* doctrine as a limitation on the right to sue that goes beyond the restrictions set by Congress in the Federal Tort Claims Act, the Court is intruding on the Constitutional prerogatives of Congress both to determine how to govern and regulate the nation's military forces and to define the federal government's waiver of sovereign immunity. The Court should address these issues.

3. The Court has not examined the text of the Act for the substantial assistance that it would provide in assessing the correctness of the *Feres* doctrine.

With the Court's abandonment of the "parallel private liability" ground as a statutory basis for the *Feres* doctrine, the Court should have, but has not, reassessed the text of the Tort Claims Act for guidance. The text shows the Congress carefully considered and dealt with the issues that the Court appears to believe that Congress overlooked.

a. The statute's text shows that Congress considered and dealt with the issues that have concerned the Court in the *Feres* doctrine, although Congress dealt with those issues in a different way. First, the Act explicitly excepts suits claiming liability for "combatant activities . . .

during time of war" (§ 2680(j)) and activities in a foreign country § 2680 (k)). Thus Congress considered special issues pertaining to the military and carefully delineated limitations on liability that it deemed appropriate. Second, Congress created exemptions from liability for certain intentional torts and for suits arising out of "exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused." The "discretionary function" exception, the Court has held, insulates the government from the risk of tort liability for the actions of government officials who have discretionary responsibility, *i.e.*, situations where government employees "necessarily [take] calculated risks, but those risks [are] encountered for the advancement of a governmental purpose . . . ." *United States v. Varig Airlines,* 467 U.S. 797, 820 (1984). It is difficult to understand how the "complex, subtle and professional decisions as to . . . control of a military force" – which this Court held in *Shearer,* 473 U.S. at 57-58, that it is the primary purpose of the *Feres* doctrine to shield from judicial intrusion – are not already shielded by Congress in the statutory discretionary function exemption.

In short, this Court has never examined the language of the Act to determine what portions of the *Feres* doctrine, if any, are not already achieved by a realistic reading of the Act. Indeed, for the almost fifty years since *Feres* was decided, the existence of the doctrine has served to "crowd out" the development of caselaw that would otherwise have applied these exemptions and other statutory limitations on liability, to cases involving military matters.

b. *Feres*'s incoherence is due, in part, to the fact that in that decision the Court speculated repeatedly about what Congress could *not* have intended by the FTCA. *See Johnson*, 481 U.S. at 695 (Scalia, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting). But such one-way speculation does not give the sympathetic reading that a statute of Congress deserves. In fact the Court has ignored the very substantial considerations that were likely on

Congress's mind in allowing suits by service members and their families for peacetime injuries and death.[3] For example, Congress may have recognized that the sacrifice that a service member makes for this country every day of his or her service warrants the protection and compensation the FTCA provides, in spite of some impact on military discipline. Congress may have been concerned that not providing the same protections and benefits to service members as were to be provided to civilians would negatively impact recruitment and morale in the armed services. Congress may have thought that the potential for duplicative recovery (i.e. veteran's benefits and tort recovery) would be resolved through a damages calculation. *See, e.g., Johnson v. United States*, 704 F.2d 1431, 1441 n.6 (9th Cir. 1983) (veterans' benefits deducted from servicemember's FTCA award). As for the families of the victims of peacetime injuries, Congress may have considered, and refused to accept, the injustice of providing no relief at all that is the result of the decision below.

Finally, it is clear that the courts of appeals are in conflict and they and the district courts need guidance as to the substance, scope, and rationale of the *Feres* doctrine. This is well documented in the Petition, at 11-18. However, it is perhaps not out of place to add that a *ratio decidendi* is in serious need of attention if it is thought by a United States Court of Appeals to turn upon the insubstantial fact that the federal government owns the ground under a public highway where an automobile accident occurred, with Kentucky having an easement to maintain and patrol that highway, as opposed to that State owning the land in fee. Yet that is the view that the Third Circuit took of the present case. Pet. App. 2a, 6a-7a. That a court of appeals could be diverted by such trivial points merely underscores how far at sea this Court has

[3] Congress is not required to enunciate its concerns in legislative history in order to have them appreciated by the courts. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

left the lower courts as to the substance and rationale of, and the source of the Court's power to propound, the *Feres* doctrine.

CONCLUSION

The Court should grant certiorari, overturn the *Feres* doctrine, and hold that the text of the Federal Tort Claims Act alone governs tort claims brought against the United States by members of its military forces.

Respectfully submitted

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IN THE

Supreme Court of the United States

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BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
AND
PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND PENNSYLVANIA TRIAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Association of Trial Lawyers of America ("ATLA") is a voluntary national bar association of

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than amici curiae, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

approximately 50,000 trial attorneys from across the country. ATLA members primarily represent injured victims of tortious conduct, as well as plaintiffs in civil rights actions and criminal defendants. ATLA members frequently represent members of the Armed Services and their families in their effort to obtain civil redress for injury. Many ATLA members, particularly those active in ATLA's Military Law Section, are themselves members of the Armed Services and are familiar with the special legal problems faced by service members.

ATLA believes that the right to seek just compensation for negligently or wrongfully inflicted injury is a fundamental element of our civil justice system. That service members are deprived of a remedy for governmental negligence which is afforded other citizens is a grave inequity. The fact that many service members are presently called upon to make the ultimate sacrifice for their country heightens the need to ensure their fair treatment under the law.

The Pennsylvania Trial Lawyers Association ("PATLA") is a non-profit organization with a membership of 3,500 women and men of the trial bar of the Commonwealth of Pennsylvania. For 20 years, PATLA has promoted the rights of individual citizens by advocating the compensation of innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual, group or entity.

Through its Amicus Curiae Committee, the Pennsylvania Trial Lawyers Association strives to maintain a high profile in the Commonwealth and federal courts by promoting, through advocacy, the rights of individuals and the goals of its membership.

Letters from both parties granting consent to the filing of this brief have been filed with this Court.

SUMMARY OF ARGUMENT

In *Feres v. United States,* 340 U.S. 135 (1950), the Judicial Branch fashioned a rule of new "common law" that on its face appeared to be inconsistent with statutory language enacted by Congress. Since that time the lowers courts have struggled to apply *Feres* in a way that would be predictable and fair. The battle to find logical and sound underpinnings for the *Feres* decision have continued over the life of the doctrine. The courts have repeatedly and distressfully noted the basic problem created by the fact that the ever-changing justifications for ignoring the clear statutory language have rendered the decision of dubious value.

The basic inconsistencies of this doctrine were set forth in detail by Justice Scalia in a 1985 dissenting opinion that was joined by three other members of the Court. *United States v Johnson,* 481 U. S. 681, 692 (1985) (Scalia, J., dissenting). The continuing nature of the problem was recently recognized in exhaustive opinions from the Second and Ninth Circuits. *Dreier v United States*, 106 F.3d 844 (9th Cir. 1996); *Taber v Maine*, 67 F.3d 1029 (2d Cir. 1995).

Finally, in the case which the petitioner now seeks to bring before the Court, the opinion below, as well as four judges of the Third Circuit who would have granted en banc consideration, joins the chorus of federal judges who have throughout the existence of this doctrine urged this Court to reconsider the need, propriety and desirability of this doctrine, particularly in light of its questionable foundation.

There can be little dispute that the circuits have and are continuing to apply differing standards to the application of the doctrine and that the treatment of an individual's claim will often depend on the circuit where his cause of action is considered. There can also be little dispute that the doctrine has and continues to be subject to reasoned, logical and constant criticism, largely because of its unfairness, changing

justifications and ignoring of what would appear to be clear statutory language. Despite its age the doctrine remains as troubled and questionable as the day it was announced and this is perhaps precisely because its basic foundations were wrong from their inception.

In light of the conflict in the circuits, the lack of clarity in the rule of law to be applied and the fundamental incorrectness of this doctrine, amici would respectfully suggest that the Court grant the petition for certiorari to either abolish this doctrine or render an opinion that can be fairly and consistently applied to those service members and their families who have and will suffer serious injuries as the result of governmental employees negligence.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUITS ARE CONFUSED AND HOPELESSLY IN CONFLICT. AS A RESULT THEY ARE APPLYING HUGELY DIFFERING STANDARDS TO WHAT IS SUPPOSEDLY A UNIFORM RULE OF LAW.

As set forth by the judges whose opinion is being appealed and who held that Feres barred the plaintiff's suit

> [W]e are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it. . . . Again, we express this concern and note that the result we reach does not actually advance the philosophy behind *Feres*.

Richards v United States, 176 F.3d 652 at 657-58 (3rd Cir. 1999).

Such misgivings have not been limited to the Third Circuit but have been echoed by Justices of this Court and

other circuits and have lead to a plethora of varying approaches to this troubled doctrine. *See United States v Johnson,* 481 U.S. 681, 692 (1985) (Scalia, J., dissenting); *Day v Massachusetts Air Nat'l Guard,* 167 F.3d 678 (1st Cir. 1999); *Taber v Maine, supra.* (2d Cir. 1995). These approaches have caused a non- uniformity of decision leading to conflict among the circuits and unequal treatment of servicemen and their families. This is particularly troubling in light of the fact that the supposed need for uniformity formed a primary justification for the doctrine. A very brief review of some of the case law will demonstrate the clear split in the circuits.

Only three years ago, the Ninth Circuit in *Dreier v United States,* 106 F.3d 844 (9th Cir. 1996), addressed a situation where an off-duty serviceman was injured on the base due to a dangerous condition of the land in an area that was restricted to military personnel. The court found the *Feres* doctrine did not apply because the plaintiff was not in any real way subject to the compulsion of military orders, nor was he performing any sort of military mission. The court authored an extremely lengthy opinion directly noting that its opinion and earlier opinions of the Ninth Circuit were likely in conflict with decisions of other circuits. *Id.* at 854 n.9.

In *Taber v Maine,* 67 F.3d 1029 (2d Cir. 1995), the Second Circuit found itself forced "into that singular tangle of seemingly inconsistent rulings and rationales known as the *Feres* doctrine." *Id.* at 1032. After recognizing the "willful and arguably misguided origins" of the doctrine, *id.* at 1039, and acknowledging that it did not have the power to abolish the doctrine, the court attempted through lengthy analysis to find some basis for consistently applying the doctrine. Ultimately, the court held that Feres was inapplicable to the plaintiff's suit. However, the court added,

> [W]e would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different

> directions that it is difficult to know precisely what the doctrine means today.

Id. at 1032.

In *Parker v United States*, 611 F.2d 1007 (5th Cir. 1980), the court held that an off-duty serviceman, who was injured on base while driving a civilian vehicle towards his home off the military reservation, was not performing any military function and therefore the *Feres* doctrine did not bar an FTCA claim.

In contrast to the above opinions, the First Circuit in *Lauer v United States*, 968 F.2d 1428 (1st Cir.), cert. denied, 506 U.S. 1033, 113 S. Ct. 812 (1992), found the doctrine to preclude a claim by an off-duty serviceman who was injured off base on a road maintained by the Navy. This gentleman was not engaged in any military mission or in any real sense subject to the compulsion of military orders, nor was he acting within the scope of his employment. His claim was nevertheless held to be precluded by *Feres*.

The Eighth Circuit in *Miller v United States*, 643 F.2d 481 (8th Cir. 1981)(en banc), held that an off-duty serviceman performing off-duty work for a private contractor was barred from recovery by the *Feres* doctrine because the power line that his ladder touched was maintained by the Army. Again, this gentleman was not acting within the scope of his employment nor subject in any real sense to the compulsion of military orders. Nevertheless, his claim was also held to be barred under the *Feres* doctrine.

While lawyers could parse syllables about the differing facts of these cases, there can be little question that different rules were and are being applied by the different circuit courts. These rules of decision are unquestionably outcome determinative and cause a complete lack of uniformity in the decisions with regard to whether a serviceman or his surviving family can pursue a claim for damages.

Certainly the plaintiff in the case at bar was not engaged in activities that fell within the scope of his military employment. Nor was he in any real way subject to the compulsion of military orders or performing a military mission at the time of the accident. He was off-duty and driving home on a roadway maintained by the state, Kentucky Highway 1638. Yet in the 3rd, 1st and 8th circuits he would be barred from proceeding, while in the 2d, 5th and 9th circuits his claim would go forward. This is only a small sample of the conflicting decisions and, rhetorical machinations aside, it beggars reason to state that plaintiff's claim or those of any service members or their families will receive evenhanded, similar treatment in the federal circuits.

This case and the *Feres* doctrine itself represent the classic case of a clear conflict in the circuits with regard to a doctrine whose raison d'être is supposed to be uniformity of application of the law. As such it is imperative that this court grant certiorari to resolve this conflict to assure that those who serve their country receive a fair and uniform application of the law.

II. THE TEST OF TIME HAS DEMONSTRATED THAT THE *FERES* DOCTRINE, DUE TO ITS UNSUPPORTABLE AND ILLOGICAL UNDERPINNINGS, SHOULD BE ABOLISHED.

In 1946 the Congress passed the Federal Tort Claims Act, (hereinafter referred to as the FTCA), 28 U.S.C.A. § 2671 *et seq*. The FTCA stated that, absent certain specifically defined exceptions, it applied to personal injury caused by an employee of the Government while acting within the scope of his employment. 28 U.S.C.A. § 1346(b). Among the areas specifically considered and legislated upon by the Congress with regard to the FTCA's coverage was a provision limiting military liability. 28 U.S.C.A. § 2680(j). It

was and is therefore clear that Congress had considered application of the Act to the military.

Despite these facts and the clear wording of the statute, the Court determined that Congress did not mean what it had said and that the FTCA should be read to include further exceptions for the military than those enacted by Congress. These exceptions, in essence drafted and legislated by the Court, are what have come to be known as the *Feres* doctrine.

Unfortunately, because courts are not designed to function as legislative bodies, the need for and ramifications of such a doctrine could not be fully evaluated and considered prior to the Court's decision. As a result of this, it soon became evident that the rationales for Feres, even putting aside the direct conflict with the statute, did not bear up under logical and reasoned scrutiny.

The first factor, which concerned the fact that military personnel already received certain benefits, ran directly afoul of another decision of the Court as well as the fact that neither the FTCA or the benefits statutes made even the slightest mention of the desire and need for such an exclusivity provision. *Brooks v United States*, 337 U.S. 49 (1949). Further, such a provision could be easily stated and was one with which the drafters of the FTCA could be fairly said to be acquainted with if they desired to enact such a provision. *See*, 28 U.S.C.A. §§ 2672, 2676, and 2679. In fact, in the decision of *Brooks v United States, supra*, the Court had upheld the bringing of an FTCA claim by a member of the military where he had received such military benefits.

The second factor, that the creation of a cause of action for a peculiarly governmental activity should not be treated in the same manner as a private cause of action because private individuals do not raise armies, though supposedly based on the text of the statute, was also soon discredited by the decisions of the Court. *See Rayonier v*

United States, 352 U.S. 315 (1957); *Indian Towing v United States*, 350 U.S. 61 (1955). This was not surprising in light of the fact that to accept this premise one had to ignore the fact that Congress had carefully crafted exceptions to the FTCA, not only for the military but for other peculiarly governmental functions. *See, e.g.*, 28 U.S.C.A. §§ 2680 (b), 2680 (c), 2680 (f), and 2680 (j).

The third factor, the need for the application of a uniform federal rule, again could not be reconciled with the statute, the decision in *Brooks* or the fact that other areas of peculiarly governmental functions were going to be treated under state laws.

Further, no uniform federal tort law was being developed. Rather, some servicemen received both state law determined and military determined benefits while others received no tort benefits at all. *Brooks v United States, supra*; *United States v Brown,* 340 U.S. 110 (1954).

In light of the above difficulties with the doctrine's factors, a post hoc justification for *Feres* was created by saying that noninterference with military discipline was one of the real concerns for the doctrine that Congress had forgotten to enact. While perhaps a laudable goal, the fact that the courts would have to consider and inquire into the same type of decisions made by the military with regard to injuries caused to civilians made this basis, like the others, a rather illogical and inconsistent underpinning for the doctrine. *Taber v Maine,* 67 F.3d 1029 (2d Cir. 1995).

So, in *United States v Johnson*, 481 U.S. 681 (1987), the Court came back to the original *Feres* factors with the exception that it left out the discredited argument on individual liability, the only factor which was even arguably based on the text of the statute. Therefore, the doctrine was now supported by nothing that was based on the statute other than the Court's determination that the FTCA did not mean

what it said. Obviously the same problems, as discussed above, exist with the present Court-legislated determinations.

This is precisely why the doctrine having come full circle with some slight modification has still left the circuit courts with the unworkable and unsupportable task of applying the *Feres* doctrine, a task which has caused them to repeatedly suggest that the Court review and perhaps abolish the doctrine. *Taber v Maine, supra*; *Day v Massachusetts Air Nat'l Guard,* 167 F.3d 678 (1st Cir. 1999); *Monaco v United States,* 661 F.2d 129, 131-132, 134, n.4 (9th Cir. 1981).

Amici would suggest that at the foundation of the doctrine's problem is the fact that the Court was attempting to legislate exceptions to a statute which simply had not been enacted. It very well may be and is perhaps more likely that Congress was not as ignorant and oblivious as suggested by the Court. Rather, in light of the wording of the statute and the exceptions enacted by Congress, Congress considered many of the problems that have arisen with the *Feres* doctrine and determined that the type of exceptions enacted by the Court would cause such inconsistency, illogic and unfairness to servicemen and women that they should not be enacted.

Of course, this we will never know. However, what we do know is that Congress did consider application of the FTCA to the military and did not make any exceptions for coverage as enacted by the Court. We know that Congress did not even enact a simple exclusivity provision as could easily have been done if it believed the Court's enactments were necessary or desirable Finally, we know that the Act addressed exclusivity but did not include that enacted by the Court.

As repeatedly suggested by a multitude of federal courts, commentators and members of this court, this legislating by the Court which flew in the face of the statutory language was improper. For this reason, as well as

the unjust and inconsistent treatment the doctrine has visited upon the service members and their families, amici would respectfully request the Court to grant the petition for certiorari to reconsider and hopefully abolish this doctrine.

CONCLUSION

For the reasons stated above, Amici, The Association of Trial Lawyers of America and The Pennsylvania Trial Lawyers Association, respectfully urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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(4)

No. 99-731

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In the Supreme Court of the United States

SHAMMARA RICHARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and court of appeals correctly held that the *Feres* doctrine bars petitioner's FTCA action because at the time of the accident in question, petitioner's decedent was on active duty with the military, was within the confines of the Fort Knox military reservation, and was driving from his on-base duty station to his on-base quarters.

2. If the *Feres* doctrine applies to this case, whether the doctrine should be modified to be inapplicable in such circumstances.

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In the Supreme Court of the United States

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SHAMMARA RICHARDS, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 176 F.3d 652. The order of the court of appeals denying the petition for panel rehearing and rehearing en banc and the dissent from the denial of rehearing en banc (Pet. App. 11a-12a) are reported at 180 F.3d 564. The opinion of the district court (Pet. App. 13a-23a) is reported at 1 F. Supp.2d 498.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1999. A petition for rehearing was denied on June 30, 1999. On September 17, 1999, Justice Souter

extended the time within which to file a petition for a writ of certiorari to and including October 28, 1999. The petition for a writ of certiorari was filed on October 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 26, 1995, petitioner's husband, a private in the United States Army, was killed when his personal automobile was struck by an Army truck. The accident occurred while he was driving toward the main post area of Fort Knox, Kentucky from his duty station, the Cullen Maintenance Facility, which is located in the Carpenter Test Area on the Fort Knox base, a few miles from the main post. See C.A. App. 79-80. For purposes of ruling on the government's motion to dismiss, the district court and court of appeals assumed, without deciding, that petitioner's husband was driving toward his home, which was located at the main post area at Fort Knox. See Pet. App. 2a n.1, 15a.

The accident occurred within the confines of the Fort Knox military base on Kentucky Highway 1638, a public road that runs through an easement of land the Army has granted to the State of Kentucky. See C.A. App. 83-85. Although it is used by the public, it is the main route between the Cullen Maintenance Facility and the main post area of Fort Knox. See C.A. App. 80.

2. Petitioner filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, alleging that her husband died "as a direct and proximate result of * * * the negligence of the United States Army and its employees." Pet. App. 28a. She alleged that her husband's death was caused by the Army's failure to maintain properly the Army truck, and by the Army's negligent supervi-

sion of the soldier who was driving the truck. See *id.* at 30a-31a.

The district court dismissed the complaint under the *Feres* doctrine, see *Feres* v. *United States*, 340 U.S. 135 (1950), which bars FTCA suits by or on behalf of soldiers for injuries arising out of or incurred in the course of activity incident to military service. Pet. App. 23a. The district court noted that to determine whether an injury is incident to military service, "courts consider the totality of the circumstances including: (1) the service member's duty status; (2) the situs of the injury; (3) and the activity the service member was performing." *Id.* at 16a. Those factors generally support a *Feres* bar "when an active status service member is injured in a vehicular accident on a military reservation." *Id.* at 18a. Moreover, the court found that the rationales for the *Feres* doctrine apply here: it avoids judicial intrusion into military affairs; it avoids subjecting a federal relationship to the fortuities of state law; and it instead provides uniform compensation in the form of federal benefits to the family of the military employee. See *id.* at 19a-22a. Therefore, the *Feres* doctrine barred petitioner's suit.

3. The Third Circuit affirmed the dismissal of petitioner's complaint for essentially the same reasons as the district court. Analyzing the totality of the circumstances to determine if her husband's injury was incident to military service, the Third Circuit held *Feres* applicable because the accident occurred within the confines of the Fort Knox military base as petitioner's husband was driving home from his on-base duty station. See Pet. App. 7a. Rehearing en banc was denied, with four judges dissenting on the ground that the *Feres* doctrine should be reconsidered. See *id.* at 11a-12a.

ARGUMENT

The decision of the court of appeals is correct and consistent with the decisions of every other circuit. In determining whether injuries are incident to service, see *Feres* v. *United States*, 340 U.S. 135 (1950), all courts of appeals evaluate the same factors in light of the "totality of the circumstances," as this Court directed in *United States* v. *Shearer*, 473 U.S. 52 (1985), and in light of the rationales for the *Feres* doctrine.

In this case, the district court and court of appeals followed those black-letter rules and reached a result that properly reflects the important rationales of the *Feres* doctrine. Indeed, all the courts of appeals that have considered the factual context presented here agree that *Feres* applies where a soldier was injured while on active duty, inside the confines of a military base, and while present at the scene of the accident because of his or her military status. This Court generally does not grant further review to reexamine the application of settled judicial doctrines to the facts of particular cases, and nothing about this case warrants departure from that practice.

Nor is further review appropriate to reexamine the *Feres* doctrine itself. This Court reaffirmed the *Feres* doctrine in *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987). The courts of appeals have faithfully followed the standards this Court has established for applying *Feres*. Modifying the doctrine at this time would upset almost 50 years of precedent, ignore Congress's repeated refusal to amend the *Feres* doctrine, disrupt the uniform system of statutory benefits the political branches have designed for service members, and otherwise seriously interfere with the military mission.

1. Petitioner contends that the courts of appeals are applying different legal tests to determine whether a service member's injury is incident to service under the *Feres* doctrine. See Pet. 11-14. An examination of the cases on which petitioner relies, however, reveals no conflict.

In *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that the FTCA does not authorize service members to bring tort suits against the government for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146. Several years later, the Court expressly stated what the lower courts had already understood about applying *Feres*'s "incident to service" test: "The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). In all cases, "the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries." *United States* v. *Johnson*, 481 U.S. 681, 687-688 (1987).

Contrary to petitioner's suggestion (Pet. 12-14), all the courts of appeals take the totality of the circumstances approach *Johnson* and *Shearer* require, examining a number of factors to determine whether an injury is incident to service under *Feres*.[1] Moreover,

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[1] See, *e.g.*, *Fleming* v. *United States Postal Serv.*, 186 F.3d 697, 699-700 (6th Cir. 1999) (following *Shearer*'s case-by-case approach); *Whitley* v. *United States*, 170 F.3d 1061, 1070 (11th Cir. 1999) (court must "evaluat[e] the totality of [relevant] factual circumstances"); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999) ("No single element in the [*Feres*] equation * * * is decisive."); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996) (discussing numerous factors in holding *Feres* appli-

the courts of appeals analyze the same basic factors in determining whether an injury is incident to service. These factors include, among others, the service member's military status (whether on active duty or on leave) at the time he or she was injured,[2] the location of the accident (whether off base or on base),[3] the activity in which the service member was involved at the time,[4] whether the service member was subject to military control and/or discipline at the time of injury,[5] and whether the activity arose out of military life.[6]

The fact that a service member was on active duty and engaged in activity related to his military obligations when he was injured implicates the distinctively federal relationship between a soldier and the military, which is one of the rationales underlying the *Feres* doctrine. See *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996). The location of an accident also can be an important factor, because an on-base location tends to confirm that the accident arose out of military

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cable); *Miller* v. *United States*, 42 F.3d 297, 301 (5th Cir. 1995) (*Feres* requires "a case-by-case assessment of the totality of the circumstances"); *Stephenson* v. *United States*, 21 F.3d 159, 162 (7th Cir. 1994) (citing *Shearer* for proposition that *Feres* is subject to no "bright-line rules" and that each case is "entitled to an independent examination"); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) (citing *Shearer* and considering numerous factors); *Shaw* v. *United States*, 854 F.2d 360, 363 (10th Cir. 1988) (holding that "the totality of the facts and circumstances surrounding the accident and * * * injuries brings the *Feres* doctrine into play").

[2] See, *e.g.*, *Stewart*, 90 F.3d at 104.

[3] See, *e.g.*, *Whitley*, 170 F.3d at 1070; *Shaw*, 854 F.2d at 363.

[4] See, *e.g.*, *Stewart*, 90 F.3d at 104; *Shaw*, 854 F.2d at 363.

[5] See, *e.g.*, *Whitley*, 170 F.3d at 1074; *Stephenson*, 21 F.3d at 162-163.

[6] See, *e.g.*, *Day*, 167 F.3d at 682; *Verma*, 19 F.3d at 648.

life; and the military has the authority to regulate what occurs on a military reservation. See *Flowers* v. *United States*, 764 F.2d 759, 761 (11th Cir. 1985). The above considerations explain why, under circumstances like those in this case, courts have concluded that only "in the event of the *rarest coincidence*," would the injured service man have been "in the same place at the same time with the same purpose, had it *not* been incident to his active status in the military." *Shaw* v. *United States*, 854 F.2d 360, 363 (10th Cir. 1988)(emphasis added). See also Pet. App. 19a.

Petitioner contends (Pet. 11-14) that the courts of appeals disagree on the extent to which courts should consider the rationales underlying the *Feres* doctrine in determining whether any particular injury is incident to service. The district court in this case, however, correctly summarized the courts of appeals' approach to that issue. If the totality of the circumstances clearly supports applying *Feres*, it is unnecessary to scrutinize independently *Feres*'s rationales to determine that an injury is incident to service. See *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994); Pet. App. 16a. That makes sense because the rationales are "incorporated in" the factors courts consider in applying the "incident to service" test. *Miller* v. *United States*, 42 F.3d 297, 302 (5th Cir. 1995) (considering service member's military status, location of accident, and activity at time of injury to decide whether FTCA suit would require courts to second-guess military decisions). Moreover, this Court has specifically cautioned courts against analyzing *Feres*'s rationales in lieu of applying the "incident to service" test. See *United States* v. *Stanley*, 483 U.S. 669, 682-683 (1987).

By contrast, if the totality of the circumstances does not unambiguously support applying the *Feres* doctrine in a given case, then courts review the rationales underlying the doctrine to verify that allowing the suit would not significantly impair the military mission. See Pet. App. 17a. Thus in *Smith* v. *United States*, No. 99-1397, 1999 WL 1005303, *3 (7th Cir. Nov. 5, 1999), the court held that *Feres* barred a claim that the military failed to prevent a drill sergeant from engaging in sexual relations with a subordinate, because resolution of the claim would have required second-guessing military judgments regarding supervision and control of service members. Similarly in *Stephenson* v. *United States*, 21 F.3d 159, 164 (7th Cir. 1994), the court held that *Feres* barred a claim that the military failed to prevent one service member from injuring another because of possible interference with military decision making. On the other hand, in *Fleming* v. *United States Postal Service*, 186 F.3d 697, 700-701 (6th Cir. 1999), the court declined to apply *Feres* in an action by a service man against the Postal Service for an accident that had occurred miles from the base while the service man was getting breakfast, and where none of the *Feres* rationales were implicated.[7]

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[7] The only apparent departure from this settled doctrine is *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). Instead of applying *Shearer*'s totality of the circumstances approach, *Taber* focused on whether the plaintiff was "engaged in activities that fell within the scope of the plaintiff's military employment," as the scope of employment concept is understood under the Federal Employers Compensation Act (FECA), 5 U.S.C. 8102. 67 F.3d at 1050 & n.21. However, no other court has adopted the *Taber* approach. And the Second Circuit has since followed the traditional analysis to determine whether an injury is incident to service stating "*Taber* does not and could not * * * in any way alter the reach of the

This decisional process is consistent with this Court's application of the *Feres* doctrine. *Shearer*, for example, involved an FTCA suit brought by the widow of a service member who was killed by another soldier away from the military base while both service members were off duty. 473 U.S. at 53. This Court held that *Feres* barred *Shearer's* suit because the allegations of the complaint would have required a court to second-guess military judgments regarding the supervision and control of service members. *Id.* at 57-59. Avoiding such interference with military decision making is one of the core *Feres* rationales. See *Johnson*, 481 U.S. at 690-691. At bottom, petitioner's claimed discrepancy (Pet. 12-14) between those courts that simply apply factors, and those that apply factors in light of the *Feres* rationales, is a distinction without a difference.

2. Petitioner incorrectly asserts that her case would have been decided differently in another circuit. Pet. 14-17. In cases that are "factually similar" to this one (Pet. 17), where a soldier was injured while on duty, while inside the confines of a military base, and while en route to an on-base destination, courts have held that *Feres* bars an FTCA action. See, *e.g.*, *Stewart*, 90 F.3d 102; *Shaw*, 854 F.2d 360; *Flowers*, 764 F.2d 759.

The cases cited by petitioner (Pet. 14-17) are readily distinguishable. For example, as the Third Circuit observed (Pet. App. 6a), the accident in *Troglia* v. *United States*, 602 F.2d 1334, 1335 (9th Cir. 1979), occurred on a public road located *outside* the confines of the military

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Feres doctrine." *Wake* v. *United States*, 89 F.3d 53, 61 (2d Cir. 1996). In *Wake*, the Second Circuit implicitly repudiated the *Taber* approach by applying *Feres* to bar the FTCA claim of a service member who was ineligible for FECA benefits precisely because the Department of Labor concluded that her injury was outside the scope of her military employment. See *Wake*, 89 F.3d at 56, 61.

base. See also *Fleming*, 186 F.3d at 700 (service member off base when automobile accident occurred); *Green* v. *Hall*, 8 F.3d 695, 700 (9th Cir. 1993) (same), cert. denied, 513 U.S. 809 (1994); *Mills* v. *Tucker*, 499 F.2d 866, 868 (9th Cir. 1974) (same). In three other cases petitioner cites, the service member was on leave (or in a status tantamount to leave) when he was injured. See *Elliott* v. *United States*, 13 F.3d 1555, 1561, vacated, 28 F.3d 1076, judgment of dist. ct. aff'd by an equally divided court, 37 F.3d 617 (11th Cir. 1994); *Pierce* v. *United States*, 813 F.2d 349, 353 (11th Cir. 1987) (per curiam); *Parker* v. *United States*, 611 F.2d 1007, 1013-1014 (5th Cir. 1980).[8] In *Feres* itself, this Court distinguished a prior case, *Brooks* v. *United States*, 337 U.S. 49 (1949), on the ground that the service member in *Brooks*, whose FTCA action was not barred, was on leave when he was in an automobile accident on a public highway. See 340 U.S. at 146.

As the courts in this case found, petitioner's husband was within the Fort Knox base because he was driving from his on-base duty station to his on-base quarters. Pet. App. 7a, 18a-19a. His activity at the time of his death indisputably arose from his military career. Under this Court's decisions, and in any circuit, petitioner's action would be barred.

3. Finally, no further review is warranted to reexamine the *Feres* doctrine. In *United States* v. *Johnson*, 481 U.S. 681 (1987), this Court expressly reaf-

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[8] Other cases petitioner cites are similarly distinguishable. *Lutz* v. *United States*, 944 F.2d 1477 (9th Cir. 1991), involved harassment that was completely unrelated to the plaintiff's military service. See *id.* at 1486-1487. In *Dreier* v. *United States*, 106 F.3d 844 (5th Cir. 1997), the service member was on military property for reasons unrelated to his military service, in the same position as any civilian would have been. See *id.* at 853.

firmed the *Feres* doctrine noting that it has never deviated from *Feres* and its "incident to service" test in the decades since it was articulated and that Congress has never modified the doctrine. *Id.* at 686. The Court "decline[d] to modify the doctrine at this late date." *Id.* at 688.

Johnson reiterated that the *Feres* doctrine is supported by three important rationales. First, because "the relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." 481 U.S. at 689 (citations and quotations omitted). Second, "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (citations and internal quotation marks omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* (citations and internal quotation marks omitted).

Since *Johnson* was decided, the Court has repeatedly denied petitions for certiorari urging that *Feres* be reexamined. In *Sonnenberg* v. *United States*, No. 90-539, the United States filed a Brief in Opposition explaining why further review to reexamine the *Feres* doctrine is unnecessary in light of *Johnson* and for various other reasons. See Brief for the United States in Opposition, *Sonnenberg* v. *United States*, No. 90-539. Since the

Court denied certiorari in *Sonnenberg*, see 498 U.S. 1067 (1991), the United States thereafter has waived a response in cases where the only question presented in a petition is whether *Feres* should be reexamined.

The government's Brief in Opposition in *Sonnenberg* responds fully to the arguments petitioner advances in seeking reexamination of the *Feres* doctrine here. Courts have had little difficulty applying the *Feres* doctrine, which is "alive and well," *Duffy* v. *United States*, 966 F.2d 307, 312 (7th Cir. 1992), and has been "broadly and persuasively applied by the federal courts," *Stewart*, 90 F.3d at 104 (internal quotation marks omitted).

Moreover, courts have extended the *Feres* doctrine to other areas of the law. For example, in the same term *Johnson* was decided, this Court extended *Feres*'s "incident to service" test to *Bivens* claims. See *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987). Other courts have applied the *Feres* doctrine to service-related claims brought under 42 U.S.C. 1983 (Supp. III 1997), see *Day*, 167 F.3d at 683-684 & n.3 (citing cases), and to FTCA claims alleging injuries to foreign service members, see *Whitley*, 170 F.3d at 1078. See also *Bois* v. *Marsh*, 801 F.2d 462, 470-471 (D.C. Cir. 1986) (*Feres* applies to intentional as well as negligent tort claims against individual military personnel). Thus, *Feres*'s "incident to service" test is hardly unworkable or in decline.

Furthermore, the *Feres* doctrine ensures that all service members—including those injured in combat abroad or in their quarters at home—receive a uniform set of benefits for service-related injuries, at a level determined by Congress and the Executive Branch. Compensation is awarded uniformly to all service members who are similarly situated, without regard to

whether their injuries were incurred in training, in combat, or while receiving benefits.[9] That uniformity is an indispensable part of maintaining high morale among all our military forces.[10] In sum, the *Feres* doctrine is necessary to the military mission and fair to service members.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] The FTCA specifically bars suits arising in foreign countries or in combat. 28 U.S.C. 2680(k) and (j).

[10] The benefits Congress has provided service members compare favorably to the workers' compensation programs applicable to civilian employees. See *Johnson*, 481 U.S. at 689-690. For example, petitioner and her children are entitled to $1225 per month in Dependency and Indemnity Compensation from the Veterans Administration, to Dependent Education Assistance, to $150,000 under the Servicemen's Group Life Insurance policy, and to a statutory $6000 death gratuity. See Brief for Appellee at 19-20; C.A. App. 124-125.

(5)

No. 99-731

Supreme Court, U.S.
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In the Supreme Court of the United States

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As we have shown (Pet. 11-14), the Third Circuit here applied a legal test for defining "activity incident to service" under *Feres* v. *United States* that conflicts with those employed by other circuits. If Shammara Richards had filed her lawsuit in the Second, Eighth, or Ninth Circuits, or in other circuits that apply tests different from that of the Third, her FTCA claim would have been allowed to proceed. Pet. 14-18. Indeed, the Third Circuit's own reasoning makes it clear that under the different methodologies used by the Second, Eighth and Ninth Circuits, Mrs. Richards would have prevailed. *Id.* at 7-8, 15-17.

To resolve that serious conflict and clarify this muddled area of federal law, this Court should grant review of the first question presented, which concerns *Feres*'s scope and application. By including the second question presented, we also ask this Court to honor the request of four judges of the Third Circuit, who, in an extraordinary dissent from the denial of rehearing *en banc*, implored this Court to "grant certiorari to revisit" *Feres* and consider "the compelling argument for [its] abandonment." Pet. App. 11a, 12a.

The government's opposition merely wishes away the juridical chaos that *Feres* continues to breed, as we explain. And the government fares no better in suggesting that the Court should refuse to consider overruling *Feres* even if it grants the first question presented. Review of both issues is warranted.

1. *The Government's Attempt To Deny The Conflict Concerning* Feres*'s Scope Is Unavailing.* The courts of appeals take at least five different approaches to determining whether an injury arises from activity that is "incident to service." Pet. 12-14; see also Br. of *Amici Curiae* The Ass'n of Trial Lawyers of America *et al.*, at 4-7. The Third, Seventh, Eleventh, and D.C. Circuits consider various factors without regard to *Feres*'s rationales. The First, Fourth, Fifth, Sixth, and Tenth Circuits consider various

factors but only insofar as they advance *Feres*'s rationales. The Eighth Circuit considers *Feres*'s rationales alone. The Ninth Circuit, having "reluctantly recognized * * * that [a] reconciliation of prior pronouncements on the [*Feres*] doctrine is not possible," *Dreier* v. *United States*, 106 F.3d 844, 848 (9th Cir. 1996) (citation and internal quotation marks omitted), considers how a particular case compares on its facts to others decided by that circuit. The Second Circuit, finally, considers whether at the time of injury a service member is acting within the scope of his military employment (subject to an exception in the "extreme case" where the discipline of the military tortfeasor would be implicated). Given that, as the Third Circuit noted here, "[t]he Supreme Court has not articulated a specific method for determining whether an injury is 'incident' to military service" under *Feres* (Pet. App. 4a), it should hardly be surprising that the courts of appeals have veered off in different directions.

a. In response, the government insists that all the courts of appeals engage in the same two-step inquiry. According to the government, every circuit first considers "the same basic factors in determining whether an injury is incident to service" (Opp. 6) and dismisses a claim if that analysis "clearly supports applying *Feres*" (*id.* at 7). If, however, "the totality of the circumstances" does not "unambiguously" support a *Feres* bar, courts proceed to "review the rationales underlying the doctrine to verify that allowing the suit would not significantly impair the military mission" (*id.* at 8).

The government's characterization of the cases cannot be reconciled with the law in the Second, Eighth and Ninth Circuits. To begin with, although we discussed them in the petition (at 14), the government fails even to mention either the Eighth Circuit's "rationales only" approach or the Ninth Circuit's "most similar case" approach (perhaps because neither fits within the government's grand theory).

As for the Second Circuit, the government admits that Judge Guido Calabresi's scholarly and rigorous opinion in *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995), which sets forth and applies a distinct "scope of employment" test, represents an "apparent departure" from the law in other jurisdictions, but it suggests that *Taber* has been "implicitly repudiated" by a later panel of the Second Circuit. Opp. 8 n.7 (citing *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996)). That is wishful thinking. The panel in *Wake* held simply that "the scope of employment considerations" of *Taber* did "not come into play" because the case before it fell within the exception in *Taber* for cases implicating "tortfeasor-related discipline considerations" (89 F.3d at 61) — hardly a repudiation, explicit or implicit. Of course, as the government well knows, the panel in *Wake* could not have overruled *Taber* even had it wanted to do so, as one panel cannot change the law of the circuit (see, *e.g.*, *Lee* v. *Commissioner*, 155 F.3d 584, 587 (2d Cir. 1998)). See also *Skees* v. *United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997), decided after *Wake*, which read *Taber* as embodying "the Second Circuit's approach" to *Feres* (and rejected it).

b. As we explained (Pet. 7-8, 14-17), this case would have come out differently under the approaches used in the Second, Eighth, and Ninth Circuits. If the Third Circuit had applied the Second Circuit's "scope of employment" test, Mrs. Richards's claim would have been allowed to proceed. *Id.* at 15. If the Third Circuit had applied the Eighth Circuit's "rationales only" approach, it would not have barred her claim either; so much is clear from the Third Circuit's opinion, in which the panel emphasized that *Feres*'s purposes did *not* support application of the doctrine in this case. *Id.* at 15-16; Pet. App. 8a-10a. And Mrs. Richards would have prevailed in the Ninth Circuit under its "most similar case" approach because, as *both* of the courts below recognized, the most similar cases in the Ninth Circuit yielded that result. Pet. 14, 16-17; Pet. App. 5a, 17a. Tellingly, the government in no way suggests that it, as

opposed to Mrs. Richards, would have prevailed under the approaches of the Second, Eighth, or Ninth Circuits. This obvious conflict, on the critical question of *Feres*'s scope, is reason enough to grant review of the first question presented.

c. The government also seeks to minimize the differences between those circuits that consider various factors alone and those that consider various factors but only insofar as they advance *Feres*'s rationales. According to the government, *Feres*'s "rationales" are "incorporated" in the "factors" (Opp. 7), and thus the "factors only" and the "factors plus rationales" approaches are in essence the same. The government's argument, however, is fatally defective.

To begin with, it is logically incompatible with the two-step approach to *Feres* that the government claims is applied in every circuit. If *Feres*'s rationales were actually "incorporated" in such factors as the situs of the injury and the duty status of the victim, the application of the factors would always be dispositive; there could never be a case where the factors would permit the suit but the rationales might nonetheless preclude it. But while under the government's theory there could never be occasion to consider the justifications for *Feres*, several courts of appeals do just that, barring a case under *Feres* only if the application of the factors serves *Feres*'s underlying purposes. See Pet. 12-13.

Illogic aside, the supposed correspondence of the various factors and *Feres*'s purposes is illusory. Consider, for instance, the fact that Mr. Richards had no choice but to commute to work on a state-run, though federally-owned, highway that crossed the 110,000-acre Fort Knox as part of the main route from Brandenburg, Kentucky to Louisville; it was no real surprise, then, that the accident in which he was killed on the way home occurred on what was technically federal property. Had he been stationed at the 170-acre Fort Hamilton in Brooklyn, New York, in contrast, Mr. Richards would almost certainly have lived off-post, and an accident

on the way home would almost certainly have occurred outside the installation, on the streets of Bay Ridge. In either case, what possible bearing could the "location of the accident" (Opp. 6) have on the "federal relationship" between service member and government, or the degree of judicial intrusion into military affairs? Nor, by the same token, does duty status correlate to *Feres*'s compensation rationale; whether on leave or active duty, all members of the Armed Forces are eligible for the voluntary Servicemen's Group Life Insurance, as well as benefits such as the $6000 "death gratuity." (In that regard, note that not even the government suggests that military benefits are remotely comparable in value to the tort remedies available to all other Americans.) What is more, *Feres*'s purposes are in considerable tension with one another, because the rationales, depending on which is emphasized, point courts to different outcomes. See also *United States* v. *Johnson*, 481 U.S. 681, 694-700 (1987) (Scalia, J., dissenting) (explaining why the rationales make no sense); Br. of *Amici Curiae* Bonnie and Edmund O'Neill, at 2-5.

It is worth noting, finally, that the Third Circuit here rejected the notion that *Feres*'s rationales are incorporated in the factors. It is precisely because the factors do *not* reflect the rationales on which *Feres* is supposedly grounded that the "factors only" approach, as the Third Circuit wrote here, leads to "disconnect[s]" between "the philosophy behind *Feres* and its application," and thus "counter-intuitive and inequitable result[s]" (Pet. App. 8a, 10a).

d. While the government asserts that the "most similar cases" to this case come out the same way (Opp. 9), the distinctions drawn by courts that come out differently are meaningless. Mr. Richards was off duty for the day, headed home for the evening to care for his wife and child, when he was killed on a state-run highway that crosses Fort Knox just before he reached the town of Muldraugh, Kentucky. The plaintiff in *Pierce* v. *United States*, 813 F.2d 349 (11th Cir.

1987) (per curiam), to take one example of many, was running errands in the middle of the work day, headed back to work with a stop at his on-post quarters, when he was unlucky enough to get hit by a car on a state-run highway that crosses Fort Stewart — but lucky enough to get hit within the city limits of Hinesville, Georgia, just 500 feet before he would have arrived on federal land. Mrs. Richards's suit was barred; Mr. Pierce's suit went forward. That these cases and others turn on such trivial distinctions is reason why (as *amici* Bonnie and Edmund O'Neill point out) the *Feres* doctrine should be clarified — or abandoned.

e. In a final effort to defeat review of the first question presented, the government avers that "[c]ourts have had little difficulty applying the *Feres* doctrine." Opp. 12. That is sheer fantasy. The government's view would no doubt surprise Judges Calabresi and Leval (among many others) who called *Feres* "extremely confused and confusing," *Taber*, 67 F.3d at 1038, not to mention the federal judges who heard this case. In fact, the lower courts here agreed about one thing: that "the two circuits that have considered factually similar cases" (the Ninth and Eleventh) "are split." Pet. App. 19a; see *id.* at 5a, 23a. But though the government maintains that the Third Circuit and the district court found a *Feres* bar for "essentially the same reasons," (Opp. 3), the courts actually *disagreed* over whether the "factors" and "purposes" required dismissal. While the district court ultimately held that application of the factors was "inconclusive" (Pet. App. 19a), the Third Circuit ruled that the factors barred recovery (*id.* at 4a-8a). The district court ruled that recovery was barred by *Feres*'s purposes (*id.* at 19a-22a), whereas the Third Circuit reached exactly the opposite conclusion (*id.* at 8a-10a). This disagreement is illustrative, and it is no wonder, then, that scores of federal judges have criticized *Feres* not only because they think it illegitimate and unfair, but because they have no idea how to determine whether activity is "incident to service" in given cases. See Pet. 20-24.

The government does not deny that the first question presented raises an important and recurring issue of federal law. Its only argument against review is to deny or diminish the conflict among the circuits. Since that basis for resisting review is meritless, this Court should at a minimum grant review of the first question presented.

2. *The Court Should Also Take This Opportunity To Reexamine* Feres *Itself.* As we explained in the petition (at 20-29), review of the first question presented, which asks that the *Feres* doctrine be clarified, justifies the Court's review of the second question, which asks that *Feres* be revisited, since the decision whether to overrule *Feres* completely is a logical precursor to the decision on how to clarify the doctrine in application. The government's arguments to the contrary are unpersuasive.

a. The government stresses that this Court, by a 5-4 vote, declined to modify *Feres* in *United States* v. *Johnson*, 481 U.S. 681 (1987). Opp. 10-12. The government also observes that the Court has denied certiorari in cases since *Johnson* "where the only question presented * * * is whether *Feres* should be reexamined." *Id.* at 12. And the government suggests that nothing since *Johnson* has changed.

This argument misses the mark. First, the government overlooks the extraordinary criticism leveled at *Feres* in recent years by the federal courts. In this case, for example, Chief Judge Becker and three other members of the Third Circuit called the *Feres* doctrine a "travesty" and urged the Court to grant certiorari, to revisit *Feres,* and to overrule it. That, to say the least, is remarkable. Other critics of *Feres*, moreover, have joined the Court since *Johnson* was decided. See *Lombard* v. *United States*, 690 F.2d 215, 228-30 & n.7, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring and dissenting in part), cert. denied, 462 U.S. 1118 (1983); *Veillette* v. *United States*, 615 F.2d 505, 506 (9th Cir. 1980) (per Fletcher, J., joined by Kennedy, J.). And as the petition documented (at 20-24), judicial and academic criticism of

Feres is legion, and (no doubt in response to the persuasive analysis set forth in the *Johnson* dissent) the volume of the criticism has been increasing steadily.

This Court often denies review to allow an issue to percolate in the lower courts, out of a healthy respect for the assistance that will be provided by the work of the circuit judges. But where, as here, judges in nearly every federal jurisdiction express profound misgivings about one of this Court's decisions, the Court should not turn a deaf ear. If for no other reason than to put these serious concerns finally to rest (one way or another), review is warranted.

The government's argument also overlooks the fact that this case, unlike ones in which review has been denied, presents an independently certworthy question relating to *Feres*'s meaning and scope. If (as we suggest), the Court should grant review of the first question presented, considering the second question presented would represent only a modest additional investment of this Court's resources. Moreover, this would avoid the problem that arose in *Johnson*, see 481 U.S. at 688 n.9, where the further validity of *Feres* was not challenged and was not the subject of full briefing (though four Members of this Court nevertheless concluded that *Feres* is indefensible).

The government is wrong to say that its previous filing in *Sonnenberg* v. *United States*, No. 90-539, "responds fully to the arguments petitioner advances in seeking reexamination of *Feres*." Opp. 12. In fact, our petition identified evidence from the FTCA's legislative history that was not discussed by the Court in *Johnson* or addressed by the government in *Sonnenberg*. See Pet. 25-26. We noted, for instance, the *Feres* Court drew the "incident to service" test from *a statute that the FTCA had repealed*, a point that the *Feres* Court failed to grasp. Pet. 25-26. This is but one example of the kind of evidence, along with new academic

commentary and opinions such as that by Judge Calabresi in *Taber*, that this Court can, and should, evaluate in addressing the validity of *Feres*.

b. Predictably, the government rehashes its arguments from *Sonnenberg* about *stare decisis*; we anticipated those arguments in the petition (at 27-29), and the government offers nothing new in response. As for our point that *Feres* is unworkable (Pet. 24), the government makes no attempt to explain how *Feres*'s "incident to service" test is any different from the "confusing and difficult" "service connection" test that this Court overruled in *Solorio* v. *United States*, 483 U.S. 435 (1987). And the government's reliance on Congress's silence in the years since *Feres* is misplaced, because, as the Court has repeatedly said, legislative inaction may result from a variety of reasons that do not imply any endorsement of this Court's decisions. See, *e.g.*, *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."); see also *Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting).

c. Lastly, the government offers an abbreviated defense of *Feres* on the merits. Opp. 11-13. Most striking about the defense, of course, is the total absence of any hint that the *Feres* doctrine could possibly be justified by reference to the text, the structure, or the legislative history of the FTCA. See Pet. 2-4, 24-27; Br. of *Amici Curiae* Bonnie and Edmund O'Neill, at 5-7, 8-10. Instead, the government argues that *Feres* is a good thing for reasons of policy.

As a pure policy matter, however, the *Feres* doctrine has little to recommend it. The policy rationales offered by the government simply do not withstand scrutiny, as the *Johnson* dissent persuasively demonstrated, 481 U.S. at 694-700. Courts that have decided the issue on policy grounds have had little difficulty rejecting the doctrine. The New Hampshire Supreme Court, for example, in an opinion joined by Justice Souter, rejected a *Feres*-like bar to certain

claims by national guardsmen arising out of military medical malpractice. *Tilton* v. *Dougherty*, 126 N.H. 294, 299-300, 493 A.2d 442, 445-46 (1985); see also *United States* v. *Stanley*, 483 U.S. 669, 709-10 (1987) (O'Connor, J., concurring and dissenting) (refusing to apply a "judicially crafted rule" such as *Feres* to shield unconscionable conduct from liability). We note, moreover, that the Court in *Johnson* was never presented with the full range of policy considerations that weigh against *Feres*. For example, by insulating military personnel from the regulatory effects of tort suits, *Feres* may have contributed to the appallingly substandard levels of care in military medical facilities. See, *e.g.*, *Military Quacks: It's Time to Repair the Military Medical System*, WASH. MONTHLY, Sept. 1, 1998, at 22; *Military Medicine: Flawed and Sometimes Deadly*, DAYTON DAILY NEWS, Oct. 5-11, 1997, at 1A (7-part series). Finally, while the government asserts that the *Feres* doctrine is both "indispensable" and "fair" (Opp. 13), the three Third Circuit judges who called the result here "inequitable," the four Third Circuit judges who called *Feres* a "travesty," numerous other judges and commentators — and, not least, victims of military negligence such as Shammara Richards and *amici* Bonnie and Edmund O'Neill — obviously disagree.

A full debate over the merits of *Feres* is of course premature (and might never take place given the government's eagerness to settle cases that present conflicts among the circuits, see *Kendrick* v. *United States*, No. 89-6143, or that conflict with *Feres* itself, see *Elliott* v. *United States*, 13 F.3d 1555 (11th Cir.), vacated, 28 F.3d 1076 (11th Cir.), judgment aff'd by equally divided court, 37 F.3d 617 (11th Cir. 1994) (discussed in the petition at 17)). If there is to be such a debate, though, this case is an ideal vehicle, offering an independently certworthy issue, a manageable record, and the prospect of thorough briefing and argument by both sides. And if the government really believes in the *Feres* doctrine, it should welcome this opportunity to silence *Feres*'s critics once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

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